IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-670

STOCKHAM VALVES AND FITTINGS, INC.,
Petitioner,

vs.

PATRICK JAMES, HOWARD HARVILLE, LOUIS WINSTON, On Their Own Behalf And On Behalf Of Those Similarly Situated, UNITED STEELWORKERS OF AMERICA, AFL-CIO, And LOCAL 3036, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner Stockham Valves and Fittings, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this action on September 19, 1977.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated September 19, 1977 is reported at 559 F.2d 310 and appears in the separate

Appendix to the petition at pages 2-99. The Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Alabama dated March 19, 1975 are reported at 394 F. Supp. 434 and appear in the separate Appendix at pages 100-221.

II. JURISDICTION

The judgment of the Court of Appeals was entered September 19, 1977. (App. 1). On October 13, 1977, the Court of Appeals stayed its mandate to and including November 12, 1977. (App. 224-25). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

The questions presented for review are:

1. Whether an employer of blacks in numbers which far exceed their representation in the relevant labor market is obligated as a matter of law to insure that blacks are distributed among jobs at all skill levels at a percentage equal to black participation in the employer's total work force without regard for the qualifications required for various jobs.

2. Whether the Court of Appeals invaded the province of the trial court by substituting its judgment as to facts for the trial court's findings of fact and by precluding the trial court on remand from making its own findings of fact and exercising its own discretion with respect to appropriate relief.

3. Whether an inference of employment discrimination may be premised on earnings disparities between blacks and whites without regard for quantitative differences in educational attainment, a productivity factor universally recognized to affect employee earnings.

IV. STATUTES INVOLVED

1. 42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Section 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a):

> It shall be an unlawful employment practice for any employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. Rule 52(a) of the Federal Rules of Civil Procedure:

> . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

V. STATEMENT OF THE CASE

This petition raises questions of national importance as to the proper use of statistical data as evidence of racial discrimination in job assignments and as to the appropriate role of a court of appeals in reviewing district court findings of fact and in fashioning relief at the appellate level.[1]

The individual respondents (plaintiffs below), three long-service black production and maintenance employees of Stockham Valves and Fittings, Inc., commenced this action individually and on behalf of other black production and maintenance employees similarly situated for claimed violations of Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981. (App. 3).

Stockham employs more than 1,800 production and maintenace employees at its Birmingham valves and fittings manufacturing facilities.[2] Down through the years at least two-thirds of these employees have been black (App. 105), although the Birmingham Standard Metropolitan Statistical Area ("SMSA") in

[1] The Union respondents, defendants below, at all times material to this action were the bargaining representatives for the individual plaintiffs and Stockham's hourly production and maintenance employees. (App. 103).

[2] Jobs at Stockham are divided according to the complexity of the job and skills required into Job Classes 2 through 13. (App. 166). High skilled production and craft jobs fall within Job Classes 10-13. Although the base pay rate of a job increases as the job class increases, actual earnings of workers are not determined by job class because virtually all of Stockham's production employees receive incentive pay (which averages approximately 25 percent of base pay). (App. 166). High skilled and craft jobs are non-incentive jobs. (App. 116).

which they reside is only 25 percent black. (App. 161). Each of the plaintiffs left previous employment with other Birmingham employers because of the superior work opportunities available to him at Stockham. (App. 199, 201). Many of the black employees at Stockham are relatively unskilled; but for their positions with Stockham they would otherwise be considered "hard core unemployables".[3] (App. 129).

Plaintiffs claimed in their complaint and at the trial that plaintiffs as a class were the subject of discrimination by Stockham, *inter alia,* in the allocation of jobs, but plaintiffs proffered no evidence that Stockham had, in fact, discriminated in initial assignments or promotions against any black employee vis-à-vis any white employee with equal or poorer qualifications.[4]

[3] Stockham's black work force was so characterized by Dr. Richard Barrett, a witness for plaintiffs on the testing issue, when he visited Stockham's Birmingham plant in 1968. In 1974 Stockham received an award from the Birmingham Urban League referable to the fact that it had hired more minority referrals during the preceding year than any other employer. (App. 129).

[4] Although Stockham employed Wonderlic tests as a factor in the evaluation of its employees for hiring and promotion purposes between 1965 and 1971, plaintiffs proffered no proof whatever to reflect that the black employees at Stockham scored worse than the white employees on the tests; instead plaintiffs relied upon a publication entitled *Negro Norms: A Study of 38,452 Job Applicants for Affirmative Action Programs,* prepared by E. F. Wonderlic & Associates, Inc. (App. 184). Expert testing psychologists for plaintiffs and defendant Stockham were in total agreement that *Negro Norms* offered no reliable information with respect to test scores referable to the black population *at Stockham*. (App. 184). While it is true that one of Stockham's expert witnesses recalled some incomplete data with respect to Wonderlic test scores at Stockham, the same witness further expressed her uncontradicted judgment that such data was so inadequate that no reliable conclusion could be reached

Furthermore, plaintiffs introduced no "pattern" evidence as to the relative qualifications of blacks and whites at Stockham and chose to rely instead upon statistical evidence to support their claim that because of race, blacks, as a class, were allocated the poorer paying, hot and dusty jobs and whites the better paying jobs with less onerous working conditions.[5] According to plaintiffs, Stockham discriminated against blacks in job assignments and promotions because (i) only 5 percent of the employees in the relatively few high skilled and journeyman craft jobs at Stockham are black; and (ii) average hourly earnings of blacks at Stockham are 91 percent of average hourly earnings of whites (without adjustments to take account of productivity factors such as absenteeism, job skills, education, etc.).

with respect to the racial impact of the tests. (App. 185). The District Court found, predicated upon these facts, that there was no proof that the Wonderlic test had a racially disproportionate impact on blacks at Stockham in violation of Title VII. (App. 186).

[5] Statistical references to the high proportion of black employees at Stockham whose jobs involve hot and dirty working conditions seemingly create a "straw" issue. Working conditions are immutable, and working conditions in foundries are by nature hot and dusty. (App. 114). The conception that blacks in substantial numbers gravitate to foundry jobs because of their qualifications for such jobs is surely more acceptable evidence of nondiscriminatory employment policies, in the absence of contradictory evidence, than the conception that an employer contrary to his economic interests deliberately assigns blacks to hot and dusty jobs merely because they are black. Furthermore, plaintiffs' claims must be considered in light of the following facts of record: (i) a great majority of *all* production and maintenance employees at Stockham are black (App. 105); (ii) hot and dusty working conditions are a characteristic of many of the high skilled jobs held predominately by white employees at Stockham (App. 130); and (iii) there was no evidence that any black employee at Stockham was exposed to more onerous conditions on his job than any white employee at Stockham in the same job, or, indeed, more onerous conditions than those of any white employee at Stockham in any job for which a black employee was qualified. (App. 115).

1. The District Court Decision

The District Court, viewing plaintiffs' statistical evidence in the context of other salient facts of record, concluded that it did not support the claims of discrimination by Stockham against blacks in either initial job assignments[6] or promotions.[7]

[6] The District Court, after hearing the witnesses, judging their credibility, and reviewing the documentary evidence of record, expressly found, *inter alia*, that since the effective date of Title VII: (i) there was no evidence that *any* black applicant at Stockham had sought and been denied a job in favor of a white applicant at Stockham; (ii) there were virtually no black applicants for employment in the greater Birmingham area who possessed the high skills needed for craft jobs at Stockham (App. 128); (iii) the 5 percent representation of blacks in high skilled jobs at Stockham compared favorably with the representation of blacks possessing such skills who live in the Birmingham SMSA, according to U.S. Census statistics (App. 128); (iv) without exception every black employee at Stockham possessing skills of a journeyman or the equivalent was employed by Stockham in a job commensurate with his qualifications (App. 128); (v) the earnings of black applicants hired by Stockham since the effective date of Title VII are statistically identical to those of post-Act white hirees (App. 163); and (vi) many of Stockham's black employees are relatively unskilled; but for the work opportunities offered at Stockham to blacks, a substantial portion of its black employees would be "hard core unemployables." (App. 129).

[7] The District Court's ultimate conclusion on this issue, adverse to plaintiffs, was predicated upon, *inter alia*, the following facts:

(i) plaintiffs failed to produce any evidence that Stockham had discriminated against any black employee by failing to promote him to a job for which he was qualified or for which he possessed qualifications at least equal to those possessed by any white incumbent employee in such a job;

The District Court, on the basis of these facts, reached the judgment that "[t]he relatively small number of blacks in certain high skilled and craft jobs at Stockham is due not to any discriminatory practices at Stockham but due instead to the absence of qualified blacks." The Court added:

> An employer is entitled to insist that his workers be qualified and as long as the qualifications, as in this case, are not artificial or established with an intent to discriminate, the employer is not required to place individuals of any race who lack such qualifications on the job. Plaintiffs have failed to establish racial stratification, through either ini-

(ii) there were no lines of progression at Stockham and no on-the-job training programs pursuant to which an employee automatically became qualified for a higher rated job by virtue of performing the duties of his current position (App. 123);

(iii) any Stockham employee may file a "timely application" for a desired job at any time whether or not the job is vacant, and may maintain applications on file for several jobs at once (App. 123);

(iv) during the relevant period nearly 1,200 timely applications were filed, 609 of which were filed by black employees; 27 percent of the timely applications filed by blacks, as compared with a statistically commensurate 31 percent of timely applications filed by whites, were granted (App. 124);

(v) there are equal earnings opportunities in almost all of the departmental seniority units (*i.e.*, in ten of the twenty-two seniority units unadjusted black gross earnings exceeded unadjusted white gross earnings, and in nine of the seniority units the unadjusted black hourly earnings exceeded unadjusted white hourly earnings) and there was no showing that black employees were denied jobs either within departmental seniority units or across departmental lines (App. 125, 166); and

(vi) plaintiffs' average hourly earnings as a class in proportion to white average hourly earnings at Stockham had increased from 85 percent to 91 percent since the effective date of Title VII. (App. 162).

> tial job assignments or promotion and transfer decisions, in the job classification system at Stockham. (App. 213).

2. The Court of Appeals Opinion

The Court of Appeals reversed. The Court concluded that statistics alone in the case *sub judice* "establish a clear prima facie case of purposeful discrimination." (App. 35). According to the Court, it was not material that black representation in high skilled and craft jobs at Stockham compares favorably with local and national labor markets. "The relevant work force for comparison purposes is Stockham where 66 percent of all maintenance and production workers are black" (App. 59) and "[b]lacks earn, on the average, $0.37 less per hour than whites." (App. 35). The Court did not consider other highly relevant statistical evidence introduced by Stockham; indeed, it even disregarded evidence as to the earnings of Stockham employees *hired after the effective date of the Act* stating that "relative changes" in earnings of such employees "recently hired" (*i.e.*, hired since the effective date of Title VII) are "irrelevant to the question of discrimination at Stockham." (App. 39). The Court also rejected Stockham's multiple regression analysis which analyzed black earnings relative to white earnings in terms of various productivity factors. The Court challenged the use of education as a productivity factor to explain earnings differences between whites and blacks. White employees at Stockham have more education than blacks and education "is not a job requirement at Stockham" hence, the Court declared, education is "irrelevant to adequate job performance." (App. 41). In so concluding, the Court ignored District Court findings predicated upon expert testimony

that an individual's educational level, regardless of race, impacts earnings.[8] (App. 41).

VI. REASONS FOR GRANTING THE WRIT

There are three special and important reasons why the writ should be granted:

1. The Decision of the Fifth Circuit Court of Appeals Conflicts In Principle With Recent Decisions of the United States Supreme Court and Directly Conflicts With Decisions of the Fourth Circuit Court of Appeals On An Important Recurring Issue Regarding the Proper Use of Statistical Evidence In Litigation Under Title VII of the Civil Rights Act of 1964.

The Court of Appeals failed to apply the principles recently mandated by this Court on the proper use of statistical evidence in Title VII cases. In *Teamsters* v. *United States,* —— U.S. ——, 52 L. Ed. 2d 396, 418 (May 31, 1977), this Court acknowledged that statistics play an important role in employment discrimination cases but admonished that "statistics are not irrefutable . . . their usefulness depends on all of the surrounding facts and circumstances." Writing for the majority in *Hazelwood School District* v. *United States,* —— U.S. ——, 53 L. Ed. 2d 768, 777-78 n.12 (June 27, 1977), Mr. Justice Stewart recognized that "when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." The Fifth Circuit failed to consider

[8] The superficiality of the Fifth Circuit's statistical analysis may explain why the Court thereafter (App. 35, 37) attempted to premise an inference of racial discrimination in job assignments upon the fact that until early 1974 some Stockham facilities were segregated.

the "necessary qualifications" for the effective performance of the various jobs at Stockham. Instead, that Court relied on undifferentiated statistics reflecting the racial composition of Stockham's entire production and maintenance work force as the basis for its erroneous conclusion that Stockham discriminates against blacks by placing them in less desirable jobs. In effect, the Fifth Circuit's decision is premised on the irrational assumption that each Stockham employee is presumptively qualified for every job at Stockham regardless of the skills required for successful performance of that job.

The Fifth Circuit held that Stockham discriminated against blacks because blacks did not occupy craft and high skilled jobs in percentages comparable to the percentage of blacks in its entire production and maintenance work force. Conversely, the District Court concluded that the five percent representation of blacks in craft jobs at Stockham was not an underrepresentation of blacks compared to the percentage of blacks with the necessary qualifications for those jobs in the local and national labor markets. (App. 128). The Court of Appeals reversed this finding as "clearly erroneous":

> The relevant work force for comparison purposes is Stockham where 66 percent of all maintenance and production workers are black. When compared with that figure, 5 percent looks paltry indeed. (Footnote omitted; App. 59).

The Fifth Circuit's analysis fails to conform to the mandates of this Court. First, contrary to *Hazelwood,* it ignores the unrebutted evidence credited by the District Court that special skills are required for the effective performance of many jobs held by Stockham employees. (App. 134-56). Due to job requirements at

Stockham, "this is not a case in which it can be assumed that all [employees] are fungible for purposes of determining whether members of a particular class have been unlawfully excluded." ***Mayor*** v. ***Educational Equality League,*** 415 U.S. 605, 620 (1974). See ***Swint*** v. ***Pullman-Standard,*** —— F. Supp. ——, 15 F.E.P. Cases 145, 150 (N.D. Ala. July 5, 1977); ***Croker*** v. ***Boeing Co.,*** —— F. Supp. ——, 15 F.E.P. Cases 165, 203 (E.D. Pa. June 20, 1977); ***Washington*** v. ***Shell Research & Development Co.,*** —— F. Supp. ——, 14 EPD ¶ 7821 (S.D. Tex. March 17, 1977); ***EEOC*** v. ***Eagle Iron Works,*** 424 F. Supp. 240, 14 F.E.P. Cases 536, 543 (S.D. Iowa 1976); ***Dobbins*** v. ***Local 212, IBEW,*** 292 F. Supp. 413, 445-46 (S.D. Ohio 1968). Second, the credited and unrebutted evidence is, and the District Court so found, that every black employee at Stockham who is qualified for a high skilled job already works in a position commensurate with his qualifications. (App. 128, 134). Absent evidence that each employee in a low skilled job could obtain the necessary qualifications for a high skilled position through on-the-job experience, the only valid benchmark for assessing whether an employer's policies and practices have a discriminatory impact on blacks seeking high skilled jobs is the percentage of blacks in the relevant labor market possessing the qualifications needed for the effective performance of the high skilled jobs.

The Fifth Circuit Court of Appeal's reliance on an undifferentiated comparison between the racial composition of the entire production and maintenance work force and that of the high skilled jobs as proof of racial discrimination conflicts with several decisions by the Fourth Circuit Court of Appeals. In ***Roman*** v. ***ESB, Inc.,*** 550 F.2d 1343 (4th Cir. 1976) (***en banc***),

plaintiffs charged their employer with, among other things, racial discrimination in job assignments in violation of Title VII. In concluding plaintiffs failed to establish that blacks were underrepresented in craft, managerial, and clerical positions, the Fourth Circuit ***repeatedly*** compared the percentage of blacks in those positions to the percentage of blacks in the relevant labor market "qualified for such work." *Id.* at 1354-55. By failing to follow the statistical methodology used by the Fourth Circuit in ***Roman*** and thereby comparing the percentage of blacks in craft and high skilled positions at Stockham to the percentage of blacks in the relevant labor market qualified for such work, the Fifth Circuit ignored the proscriptions of this Court concerning the use of statistics in the context of self-evident facts of industrial life. The conflict, therefore, between the Fifth Circuit and the Fourth Circuit is fundamental and irreconcilable.

This conflict between the Fifth Circuit and the Fourth Circuit on the use of comparative work force statistical evidence in employment discrimination cases is again apparent in ***Patterson*** v. ***American Tobacco Co.,*** 535 F.2d 257 (4th Cir.), ***cert. denied,*** 429 U.S. 920 (1976). ***Patterson*** involved the Fourth Circuit's review of a trial court's order mandating preferential promotions for women and blacks until their percentages in the employer's supervisory work force equaled their percentages in the general Richmond SMSA work force. The Fourth Circuit determined that the proper comparison was between the percentages of women and blacks in the Richmond SMSA ***supervisory*** work force and the percentages of women and blacks promoted since 1965 by the employer since "[t]hose percentages furnish a more realistic meas-

ure of the company's conduct." 535 F.2d at 275.[9] It is difficult to imagine a less realistic benchmark of Stockham's treatment of its minority employees than the Fifth Circuit's simplistic statistical work force comparison utilized in this case.[10]

The issue presented on the proper use of comparative work force statistics arises in virtually every action under Title VII involving claims of racial discrimination in job assignments and in promotions. The recent opinions in *Teamsters* and *Hazelwood* provide considerable direction on the proper use of statistical work force comparisons as evidence of racial discrimination *in hiring;* this Court's review of the decision of the Fifth Circuit Court of Appeals in this case would clarify the role of statistical evidence in Title

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[9] Accord *EEOC* v. *United Virginia Bank,* —— F.2d ——, 15 F.E.P. Cases 1257, 1259 n.7 (4th Cir. May 10, 1977) ("Where the work requires special qualifications, it is proper to consider the ratio of qualified blacks and whites in the appropriate work force rather than the ratio of the gross percentage of blacks and women in the whole work force, including, unskilled labor.")

[10] See also *Hester* v. *Southern Ry. Co.,* 497 F.2d 1374 (5th Cir. 1974), where the Fifth Circuit refused to find proof of racial discrimination in hiring for a data typist job based on a comparison between the percentage of blacks in the general SMSA and the employer's work force:

> [C]*omparison with general population statistics is of questionable value when we are considering positions for which, as here, the general population is not presumptively qualified.* Data Typist applicants were required to prove their ability to type at a minimum speed of sixty corrected words per minute as a prerequisite to consideration by Southern for employment . . . A more significant comparison might perhaps be between the percentage of blacks in the population consisting of those able to type 60 wpm or better and, the percentage hired into the Data Typist position by Southern. (Italics supplied; *Id.* at 1379 n.6.)

VII cases involving claims of discrimination in initial job assignments and in promotions.

The statistical methodology mandated by the Fifth Circuit in this case requires an inference of discrimination when blacks are not equally represented at all levels of an employer's work force, without regard for qualifications. The anomalous result of the Fifth Circuit's rule is to penalize an employer, such as Stockham, who has attracted to its work force a large number of blacks, including many of the "hard core unemployed." (App. 129). See *Hill* v. *Western Electric,* 12 F.E.P. Cases 1175, 1179 n.4 (E.D. Va. 1976), *appeal docketed,* (4th Cir. No. 76-2439). It is more likely that such an employer will be found guilty of unlawful discrimination in job assignments than the employer whose job opportunities for blacks are limited to the percentage of blacks in the relevant labor market.[11]

The decision of the Fifth Circuit in this case illustrates the uncertainty presently surrounding the proper manner to prove racial discrimination in job assignments through statistical disparities in work forces. This uncertainty obviously impedes the effective implementation of the equal employment opportunity laws and the attempts of employers to identify and comply with the mandates of such laws. See, *e.g.,* F. C. Morris, Jr., *Current Trends In The Use (And Misuse) Of Statistics In Employment Discrimination*

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[11] As the District Court found, based upon unrebutted expert testimony, the proper inference to be drawn from statistics showing a significant over-representation of blacks is that Stockham offers superior job opportunities to blacks and that blacks migrate to Stockham jobs. (App. 161-62).

Litigation (Equal Employment Advisory Council 1977). Proper resolution of the issue by this Court is necessary to bring order to the chaotic state of employment discrimination case law.

2. The Court of Appeals So Far Departed From the Accepted Scope of Judicial Review By Reevaluating Findings of Fact Below, By Reweighing the Evidence, By Substituting Its Judgment As To Facts For That Of The Trial Court, and By Rigidly Confining the Trial Court's Discretion Regarding Appropriate Relief, As To Call For An Exercise Of This Court's Powers Of Supervision.

This Court has become increasingly concerned with encroachment of appellate courts upon district courts, particularly in cases that may turn upon statistical evidence and the credibility of witnesses or that may require injunctions of broad impact affecting opportunities and expectations of a large group of people. Indeed, this Court has said that the proper allocation of functions between district courts and courts of appeals raises issues "every bit as important" as the issues raised by an appeal on the merits, including issues raised in a racial discrimination case. *Dayton Board of Education* v. *Brinkman,* —— U.S. ——, 53 L. Ed. 2d 851, 857, 862 (June 27, 1977); *Hazelwood School District* v. *United States, supra,* 53 L. Ed. 2d at 780; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); *Mayor* v. *Educational Equality League,* 415 U.S. 605, 621 (1973).

In the case at hand the Court of Appeals engaged in a de novo fact-finding process, disregarding the weight the trial court accorded the evidence. Thereafter, it substituted its judgment second hand for that of the trial court and fashioned its own remedies.

Such an invasion of the trial court's functions warrants the exercise by this Court of its supervisory powers not merely because it permeates the entire appellate opinion in *this* case, thus vitiating its legitimacy as an appellate decision, but more significantly because it impugns the integrity of trial courts generally and undermines the established, efficient, and orderly allocation of functions in the federal judiciary. Fair employment statutes have resulted in a proliferation of complex and lengthy lawsuits, won or lost by means of documentary evidence, statistical proof, and conflicting testimony. If courts of appeals are permitted to reevaluate evidence, determine anew the weight and credibility of witnesses' testimony, and adjudicate relief, the value of a trial court's intimacy with the facts over a long period will be forfeited and replaced by the dangers attendant to the necessarily circumscribed vision of an appellate court, straining to see the evidence itself from afar.

Barely acknowledging the clearly erroneous rule,[12] the Fifth Circuit reweighed items of evidence bearing on critical issues and, after overturning factual findings below, utilized its own substituted factual findings to pyramid and overturn still other trial court findings. By reference to its own findings, it thus boot-strapped reversals of factual findings by the trial court. For example, the Court of Appeals extracted testimony of one witness regarding two medical dispensary rest-

[12] Fed. R. Civ. P. 52(a). The rule forbids setting aside factual findings on appeal unless they are clearly erroneous and, as interpreted by this Court, prohibits de novo determination of factual issues on appeal. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969). The rule applies to all factual findings, including factual inferences from undisputed facts or documents. *Commissioner* v. *Duberstein,* 363 U.S. 278, 289-91 (1960).

rooms, construed that witness' testimony directly contrary to the trial court's own construction and credibility judgment, and thereby changed the facts concluding that the two restrooms were segregated at the time of trial. This independent appraisal of oral testimony contravenes the rule requiring that due regard be given to the trial court's opportunity to assess testimony of witnesses. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949).

The Court of Appeals next overturned the trial court's finding that a dispute over alleged segregation of facilities had been resolved by a 1974 conciliation agreement between Stockham and the EEOC, predicating its reversal on the proximity of that agreement to trial time. According to the Fifth Circuit, the "evidence" of the racially separate dispensary restrooms and the company's "intransigent resistance" to desegregation of plant facilities indicate that the District Court "over-relied on the conciliation agreement" (App. 19), despite the explicit, unchallenged findings below of Stockham's efforts over a period of several years to resolve the facilities issues with the EEOC (App. 180-81); efforts which were directly frustrated by that agency's failure to perform its statutorily directed conciliation role. The finding of Stockham's "intransigent resistance", repeated throughout the Fifth Circuit's opinion, was totally without evidentiary support and directly contrary to the District Court's finding of Stockham's good faith attempts to comply with the Act which was neither noted nor overturned by the Court of Appeals. The Fifth Circuit thus ignored the prohibition against de novo fact-finding on review. It also breached the rule that a finding is not clearly erroneous merely because the reviewing

court gives the facts another construction, resolves ambiguities differently, or attributes a more sinister cast to actions deemed innocent by the trial court. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 495-96 (1950).

Moreover, these invasions of the trial court's functions were aggravated when the Fifth Circuit utilized its own findings regarding the dispensary restrooms and the "intransigent resistance" to desegregation to fashion, at least in part, its independent findings of discrimination in initial job assignments (App. 43) and in promotions (App. 68), despite the total absence of evidence that any purported segregation of employee facilities ever affected job assignments. The conclusions of job discrimination are thus fatally flawed because they are premised on invalid (as well as irrelevant) findings made by the Court of Appeals in derogation of the District Court.

Invasions of the trial court's traditional province so permeate the Fifth Circuit's opinion that it reads like a district court's findings of fact. Indeed, the District Court and Court of Appeals opinions appear to address entirely different lawsuits. The disparity is not due to clearly erroneous findings by the trial court but, in large part, to independent findings by the Fifth Circuit conjured from non-existent evidence and in disregard of unrefuted evidence below,[13] or premised on

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[13] The Fifth Circuit made findings contrary to the undisputed evidence when it:

(i) based its conclusion that the Wonderlic test adversely impacts black Stockham employees in part upon a nationwide study, (*Negro Norms*), not involving Stockham. (App. 47, 51). The *only* testimony regarding this study was that of experts for both parties who agreed

credibility judgments contrary to those made by the trial court,[14] or developed de novo after reversals of

that no inference of adverse impact at Stockham may be predicated upon such evidence. The irrelevance of this study to Stockham is confirmed by the EEOC's "Guidelines on Employee Selection Procedures", 29 C.F.R. §§ 1607.0, *et seq.*;

(ii) concluded that the trial court "gave too much weight" to plaintiffs' failure to offer evidence of actual scores blacks and whites achieved on the Wonderlic test because accumulation of the evidence would have been too burdensome on plaintiffs. (App. 49 & n.39). The Court's finding of burdensomeness, which has its genesis in plaintiffs' appellate brief, was made without any showing that a survey of at least a representative sample of scores at Stockham was impossible or unrealistic (App. 185 ¶ (e)) and is unsupported by any evidence;

(iii) based its conclusion of discriminatory job allocations in part upon its independent finding that the "vast majority of blacks" work in undesirable (particularly hot and dusty) working conditions. (App. 35, 75). The Court ignored but left in tact findings below, based on unrebutted evidence and made on a job-by-job basis, that many high skilled jobs occupied predominantly by whites have onerous working conditions (App. 130 ¶¶ 6 & 7, 134-56, especially ¶¶ 29, 31, 32, 34, 35, 37) and that some of the jobs in which blacks predominate and which are associated with hot and dusty conditions are "more desirable" skilled jobs and, ironically, historically have been considered "white jobs" at other employers in the southeastern United States. (App. 114, 127 ¶ 8). Moreover, the Court ignored the obvious reality that since blacks constituted two-thirds of all production and maintenance employees at Stockham, even if blacks were evenly distributed through all job classes as the Court suggests, blacks would continue to predominate in all jobs with "undesirable" working conditions; and

(iv) remanded the issue on whether the seniority system is bona fide (App. 85, 91), despite the District Court's express, undisturbed factual finding that the system was "developed because of functional, nonracial reasons." (App. 127 ¶ 6). The District Court's finding, which constitutes a conclusion that the system is bona fide, was entirely ignored by the Fifth Circuit despite the fact that the Court of Appeals seemingly accepted Stockham's departmental seniority system as bona fide to the extent that it was utilized by plaintiffs as a productivity factor favorable to blacks in plaintiffs' statistical presentations.

[14] The Court of Appeals accorded no deference to the trial court's

legal standards utilized by the District Court, which thus never had the opportunity to make factual findings in accordance with the legal standards enunciated by the Court of Appeals.[15]

Such appellate fact-finding represents a drastic departure from fundamental principles of appellate review. These principles dictate that a reviewing court

opportunity to observe the demeanor of witnesses and to evaluate their testimony when it:

(i) believed Jack H. Adamson's testimony that Stockham does not utilize the Tabaka tests in making employee selection decisions (App. 54), whereas the District Court believed the same witness' testimony, not referred to in the Fifth Circuit's opinion, that the tests were utilized (App. 191);

(ii) credited the testimony of plaintiffs' statistician, Martin Mador, who made a poor impression at trial, admitted to numerous errors on cross-examination, and whose mathematics the district court considered "simple" and questionable " 'statistics.' " (App. 156). The trial court attached greater weight to the testimony of defendant's expert Dr. Gwartney and to his unrefuted testimony regarding the need to adjust an earnings comparison to take into account productivity factors;

(iii) reversed the District Court's finding that Stockham had not discriminated against the named plaintiffs, although the record lacked substantive evidence of discriminatory acts, or of their qualifications for any jobs they were purportedly denied. In particular the District Court attached little weight to plaintiff James' testimony, partly because of his audacious exaggeration of his educational accomplishments which were impeached by a sealed transcript, showing a majority of failing grades and many fewer course hours than he represented, which was included in the record on appeal; and

(iv) extracted, out of context, Dr. Haworth's testimony in footnote 39. See note 13(i), *supra*.

[15] For example, the Fifth Circuit rejected as "legally irrelevant" the trial court's finding of no discrimination in craft positions, premised on absence of evidence that any qualified black had been rejected for a craft job. (App. 58). After five pages of appellate fact finding, the Court concluded that Stockham had discriminated against blacks in selection and training of craftsmen.

must not substitute its judgment as to facts for that of the trial court by deciding whether it would have found otherwise, but must confine its review to determining whether the trial court could permissibly find as it did. *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra.* Accordingly, "where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants . . . [s]uch a choice between two permissible views of the weight of the evidence is not 'clearly erroneous'." *United States* v. *Yellow Cab Co., supra,* 338 U.S. at 342. Findings which have substantial support in the evidence will be accepted by the reviewing court as unassailable. *Alabama Power Co.* v. *Ickes,* 302 U.S. 464, 477 (1938); *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U.S. 412, 420 (1937). The Fifth Circuit abrogated these established principles by weighing testimony and other evidence anew.

Moreover, the Court of Appeals' reversal of the legal standards employed below without a remand to enable the trial court to reevaluate the evidence against the revised legal standards exhibited disregard for proper distribution of judicial functions in the federal judicial system. That distribution represents a deliberate judgment that trial courts are better equipped than appellate courts to evaluate evidence and to make factual findings. *Hazelwood School District* v. *United States, supra,* 53 L. Ed. 2d at 781. See, *e.g., Uebersee Finanz-Korporation* v. *McGrath,* 343 U.S. 205, 212-13 (1952); *Busey* v. *District of Columbia,* 319 U.S. 579 (1943).

The Fifth Circuit invaded the trial court's domain not only by making de novo factual findings but also by restricting the trial court's discretion to fashion

appropriate relief. Once a plaintiff has established a violation of Title VII, the selection of remedies and framing of decrees become the duty of the trial court, which is vested with discretion to model its judgment to fit the exigencies of the particular case. *Dayton Board of Education* v. *Brinkman,* —— U.S. ——, 53 L. Ed. 2d 851, 862 (June 27, 1977); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 421-22 (1975); *International Salt Co.* v. *United States,* 332 U.S. 392 (1947). See also *United States* v. *Greater Buffalo Press, Inc.,* 402 U.S. 549, 556-57 (1971).

Contrary to this fundamental principle, the Fifth Circuit on two separate occasions directed that plaintiffs "are entitled" to equitable relief,[16] on two separate occasions stated the District Court "must" issue particular injunctions or that an injunction is "necessary",[17] on seven occasions directed that the District Court "should" issue particular injunctions,[18] and on four separate occasions so strongly suggested, in increasingly imperative terms, that the District Court grant certain relief as to afford the trial court no realistic choice or room for discretion.[19] Moreover, on one occasion the Fifth Circuit in effect issued its own injunction when it directly ordered Stockham to as-

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[16] App. 51 (Wonderlic test); App. 67 (age requirements).

[17] App. 88 (segregated restrooms); App. 89 (selection and training for craft and supervisory positions).

[18] App. 89 (high school and age requirements for apprenticeship training); App. 90 (written guidelines for use by supervisors in selecting apprenticeship candidates; development of apprentice selection procedures; development of guidelines for supervisor selection; restructure of supervisor selection process; recruitment at black schools; posting job vacancies and qualifications).

[19] App. 88-90 (segregation of facilities); App. 91-93 (type of seniority relief); App. 93-96 (backpay); App. 96-97 (front pay).

certain and publicize objective qualifications for apprenticeships. (App. 90).

The task of a court of appeals is limited:

> If [the Court of Appeals] concludes that the findings of the District Court are clearly erroneous, it may reverse them under Fed. Rules Civ. Proc. 52(a). If it decides that the District Court has misapprehended the law, it may accept that Court's findings of fact but reverse its judgment because of legal errors. *Dayton Board of Education* v. *Brinkman,* —— U.S. ——, 53 L. Ed. 2d 851, 862 (June 27, 1977).

The Fifth Circuit neither undertook nor understood either function. While giving lip service to the clearly erroneous rule, it reevaluated evidence de novo and substituted its intuitive judgment for that of the trial court. After overturning legal standards, it developed its own findings of fact to which it applied the revised legal standards. Though it remanded the case to the District Court for "framing" of relief, that task seemingly would be ministerial rather than discretionary because of the Court of Appeals' rigid directions.

In the context of unequivocal usurpation of trial court functions, the decision herein of the United States Court of Appeals for the Fifth Circuit presents the clearest kind of case for the application of the supervisory powers of this Court in the interest of preserving orderly and efficient operation of the federal judiciary. By granting this petition, this Court can eliminate needless appeals with duplicitous reviews of fact, minimize incorrect appellate dispositions, and definitively clarify the role of trial courts in evaluating statistics and other evidence.

3. Evidence of Quantitative Differences In Educational Attainment, Universally Recognized To Influence Earnings, Cannot Be Rejected When Comparing the Earnings of White and Black Employees.

Job applicants of whatever race bring with them to their employment cognitive skills and other characteristics over which their employer has no control and which may have nothing whatever to do with an employer's job requirements for selection but nevertheless have a direct and measurable impact on their earnings. In a given manufacturing plant such productivity characteristics may wholly explain differences in earnings between black employees and white employees which might otherwise erroneously be attributed to racially discriminatory policies. This Court, in other settings, has acknowledged the importance of one of these factors, education, as an influence in all aspects of life. In *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954), this Court commented:

> [Education] is a principal instrument in awakening the child to cultural values, and in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Using a multiple regression statistical technique similar to that utilized by plaintiffs in *Wade* v. *Mississippi Co-operative Extension Service,* 528 F.2d 508 (5th Cir. 1976), Dr. James Gwartney, a labor economist on the faculty of Florida State University, identified those factors susceptible to measurement which affected employee earnings at Stockham and reached

the conclusion that there was no statistically significant difference between the compensation received by white and black employees with similar productivity characteristics. The trial court relied on Dr. Gwartney's study which was not challenged by opposing expert testimony and concluded that Stockham provided equal earnings opportunities to both races in its work force.

The Fifth Circuit, while not rejecting the validity of the analytical technique, dismissed Dr. Gwartney's study as "factually inadequate" and criticized his choice of productivity determinants. Among the factors rejected, the Court of Appeals concluded that Dr. Gwartney improperly considered educational attainment in assessing productivity. In cavalierly dismissing the Gwartney study demonstrating the impact of productivity factors on earnings at Stockham, the Fifth Circuit Court of Appeals committed the same error as did the Eighth Circuit in *Hazelwood School District* v. *United States, supra,* by totally disregarding the possibility that prima facie statistical proof can be rebutted at the trial level.

In making its intuitive determination, the Court of Appeals casually rejected a widely-observed and documented phenomenon that, *on average,* a higher educational level will yield higher earnings regardless of race. The Fifth Circuit discarded educational attainment for two reasons:

> The fallacy in this conclusion [*i.e.,* that education impacts earnings] stems from two facts: (1) as the defendant concedes, education is not a job requirement at Stockham, and (2) white employees at Stockham have more education than blacks. Thus, adjusting for education in a regression analysis of earnings where education is not related to job performance and where one race is more educationally disadvantaged than another, masks racial differences in earnings that may be explainable on the basis of discrimination. Certainly such differences cannot fairly be explained on the basis of a factor, such as education, concededly irrelevant to adequate job performance. (App. 41).

The Fifth Circuit's error evolves from the sophistry of its argument: education is not a requirement for employment (or placement on a job) and, therefore, it is "irrelevant" to adequate job performance. Logically, the conclusion does not necessarily follow from the premise. For example, an employer may not have a policy that dictates an "acceptable" maximum level of employee absenteeism. Yet excessive absenteeism adversely affects productivity on the job without reference to the employer's general policy requirements on absenteeism.

Embracing a "warm body" hypothesis, the Court of Appeals categorizes employees as either "qualified" or "not qualified." Within each group, in the Court's view, employees are fungible. The Court's analysis does not acknowledge that employees typically exhibit a spectrum of competencies, or the statistically-supported observation that education favorably influences earnings.

Although not articulated, the Court confused the mandate of *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), that employee selection devices have a demonstrable relationship to job performance with widely-held economic principles that productivity factors have a statistically significant impact upon employee

earnings. The two concepts are logically independent and not inconsistent.

The economic literature, without important exception, acknowledges the premise that *on average* educational attainment favorably influences earnings. One authority observes:

> The conviction that more education leads to higher income finds extensive support in statistical data. The simple correlation between educational attainment is very strong and consistent: more years of education *do* lead to higher income. B. R. Schiller, *The Economics of Poverty and Discrimination* 98-99 (1973).

See also, *e.g.*, L. C. Thurow, *Poverty and Discrimination* 70-71 (1969); W. L. Hansen, et al., "Schooling and Earnings of Low Achievers", 60 *The American Economic Review* 409 (1970). This is so largely because level of education serves as a proxy for a measure of cognitive skills and motivation attributes. See B. A. Weisbrod, "Investing in Human Capital", *The Daily Economist* 149 (1973). The fact that a specified education level is not a job entrance requirement is not relevant to productivity.[20]

The common-sense recognition that educational attainment increases earnings in the workplace escaped the Court of Appeals, despite uncontradicted expert testimony in the record. If the Fifth Circuit's rejection of education as a matter of law as a factor influencing earnings is permitted to stand, the conse-

[20] The Fifth Circuit's opinion suggests that seniority, which "favors" blacks in Dr. Gwartney's study, is a permissible productivity factor despite the fact that there are *no* seniority or tenure requirements for jobs at Stockham. (App. 40-42).

quences for future employment discrimination litigation will be dramatic. The Court, without any regard for the community of professional knowledge, rejects weighing a factor which demonstrably impacts earnings. By precedent, the Court of Appeals forecloses future litigants from exploring the productivity characteristics of their work forces.

The Fifth Circuit's approach is justified in a voter registration or jury selection case where voters, or jurors, are fungible as citizens. However, the analytical framework is illogical and inappropriate in the employment context. Economists conclude that many characteristics influence employment productivity; some characteristics may not be distributed in a racially balanced fashion in a particular employment environment. The Court of Appeals precluded, as a matter of law, consideration of productivity factors in general, and education in particular, as a possible explanation of earnings differentials.

The importance of this issue cannot be overstated. If the inflexible approach of the Court of Appeals survives, then employers will be required to compensate employees according to race rather than productivity. That result has national implications which undermine this Court's rationale in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), that employee qualifications must serve as the determinants of job success. The intervention of this Court is necessary to assure that differences evolving from objective productivity characteristics will not, in and of themselves, constitute evidence of a violation of Title VII of the Civil Rights Act of 1964.

VII. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2176

D. C. Docket No. CA-70-G-178

PATRICK JAMES, ET AL.,
Plaintiffs-Appellants,

versus

STOCKHAM VALVES and FITTINGS CO., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

Before WISDOM, CLARK and RONEY, *Circuit Judges.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

September 19, 1977

Issued as Mandate:

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Patrick JAMES et al.,
Plaintiffs-Appellants,

v.

STOCKHAM VALVES AND FITTINGS
Co. et al., *Defendants-Appellees.*

No. 75-2176

September 19, 1977

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Richard A. Cohen, Atty., Charles L. Reischel, EEOC, Washington, D.C., for amicus curiae.

John C. Falkenberry, Jerome A. Cooper, John J. Coleman, Jr., James P. Alexander, Birmingham, Ala., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before WISDOM, CLARK, and RONEY, *Circuit Judges.*

WISDOM, Circuit Judge:

This appeal presents issues of segregated facilities and programs that were long ago resolved in the courts of this country. The case also raises issues related to job assignment, transfer, promotion, training, recruitment, seniority, and testing; some of the answers to these questions seem clear, but others are still being formulated by legal processes. All of the issues, the settled and the unsettled, are intertwined.

I.

STATEMENT OF THE CASE

On October 5, 1966, the named plaintiffs, Patrick James, Howard Harville and Louis Winston, black employees at Stockham's Birmingham facilities, filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") against Stockham Valves and Fittings, Inc. ("Stockham" or "company"), alleging that the company maintained racially segregated facilities; discriminated against black employees in job assignment, promotion, training, and transfer; and employed discriminatory testing, education, and age requirements. The EEOC found "reasonable cause" to believe that Stockham engaged in discriminatory practices and issued the plaintiffs a "right to sue" notice in February 1970.

The plaintiffs brought this class action suit on March 16, 1970, within the thirty-day statutory period, against Stockham under the Civil Rights Act of 1866, 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The plaintiffs filed an amended charge of discrimination with the EEOC on June 8, 1970, against the United Steelworkers of America, AFL-CIO ("Steelworkers") and its Local 3036 ("Local" or "Union"), and later amended its complaint by adding the Steelworkers and the Local as defendants. The union defendants are alleged to have violated Title VII and 29 U.S.C. §§ 151 *et seq.* ("the duty of fair representation"). The district court referred the case to the EEOC for conciliation until June 1973 when the district court granted the plaintiffs' motion to set aside the stay order. The court certified the class represented by the named plaintiffs under Rule 23(b)(1), F.R.Civ.P., to include all black hourly production and maintenance employees of Stockham who are currently employed and all black persons who have been so employed at Stockham from July 2, 1965, to the date of trial. The trial was held from February 4 through February 22, 1974.

The district court rendered final judgment March 19, 1975. Relying heavily on the proposed findings of fact and conclusions of law filed by the defendant Stockham,[1] the

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[1] In Appendix A to their initial brief filed in this Court the plaintiffs tabulated a page-by-page comparison between the district court's findings of fact and conclusions of law and those proposed by the defendant Stockham. The analysis reveals that 92 percent of the district court's factual findings are identically or substantially the same as those the defendant Stockham suggested; while, 98.2 percent of the district court's conclusions of law are identically or substantially the same as conclusions proposed by Stockham. The plaintiffs concede that in this Circuit the "clearly erroneous" standard of Rule 52(a), F.R.Civ.P., applies to a trial judge's factual findings whether he prepared them or they were developed by one of the parties and mechanically adopted by the judge. *Volkswagen of America, Inc. v. Jahre,* 5 Cir. 1973, 472 F.2d 557; *Railex Corp. v. Speed Check Co.,* 5 Cir. 1972, 457 F.2d 1040, *cert. denied,* 409 U.S. 876, 93 S.Ct. 125, 34 L.Ed.2d 128; *George W. Bennett Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.,* 5 Cir. 1974, 502 F.2d 1045. Nevertheless, under *Louis Rreyfus and Cie. v. Panama Canal Co.,* 5 Cir. 1962, 298 F.2d 733, this Court can take into consideration the district court's lack of personal attention to factual findings in applying the "clearly erroneous" rule. This Court has expressed its disapproval of a district court's mechanical adoption of the proposed findings of fact of a party. *See Lorenz v. General Steel Products Co.,* 5 Cir. 1964, 337 F.2d 726, 727 n. 3; *George W. Bennett Bryson & Co., Ltd. v. Norton Lilly & Co.;* Wright and Miller, Federal Practice and Procedure § 2578 at pp. 705-708 (1971). As we observed in *Louis Dreyfus,* "the appellate court can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered" when factual findings were not the product of personal analysis and determination by the trial judge.

> The findings also will carry more of a badge of personal determination when the trial judge has selected certain of the proposed findings but written others himself or when he has revised and edited the proposed findings, than they will when he has adopted a slate of findings verbatim. It must be remembered, however, that . . . [w]hen substantial evidence supports a finding it will not be found clearly erroneous merely because the expression of the finding was adopted from a proposal by counsel.

Louis Dreyfus & Cie. v. Panama Canal Co., supra, 298 F.2d at 738-39.

Of course, the clearly erroneous standard does not apply to findings made under an erroneous view of controlling legal principles. *United States v. Jacksonville Terminal Co.,* 5 Cir. 1971, 451 F.2d 418, 423-24, *cert. denied,* 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed. 2d 815; *Rowe v. General Motors Corp.,* 5 Cir. 1972, 457 F.2d 348, 365 n. 15. In addition, "findings of 'ultimate' fact such as whether *a series of acts* did or did not establish the existence of a violation of Title VII was a legal conclusion and not controlled by the 'clearly erroneous' rule." (emphasis in original) *Bolton v. Murray Envelope Corp.,* 5 Cir. 1974, 493 F.2d 191, 195, *citing United States v. Jacksonville Terminal,* 451 F.2d at 423.

[2] The district court's finding of fact and conclusions of law are reported at 394 F.Supp. 434.

[3] The Equal Employment Opportunity Commission filed a brief as *amicus curiae* in support of the plaintiffs-appellants, contending that the district court's factual findings relevant to the discrimination allegations are clearly erroneous, that the failure of the court to enjoin the maintenance of segregated facilities is an abuse of discretion, and that the court's refusal to award backpay constitutes a disregard of well-established legal principles.

court found that, except for those segregated facilities maintained by Stockham and resolved in a conciliation agreement between the EEOC and Stockham two weeks before the trial, Stockham had engaged in no employment discrimination.[2] The plaintiffs appeal from the district court's judgment in favor of the defendants.[3]

II.

Facts

A. *Introduction*

Stockham is engaged in the manufacture of cast iron valves; malleable fittings; bronze, iron and steel valves; and other industrial valves and fittings at its facilities in

Birmingham, Alabama. The product diversity and overall capacity of the company have gradually increased since Stockham was founded in 1903. By 1973 Stockham's work force in Birmingham was comprised of more than two thousand employees. Although the district court found that "[h]istorically, approximately two-thirds of Stockham's employees have been black", 394 F.Supp. at 443, the record reveals that the two-thirds figure applies to production and maintenance workers during the years from 1966 to 1973. Approximately 56 percent of the entire work force at Stockham's Birmingham facility was black during that same period, a figure larger than the percentage of blacks in the Birmingham area.

The district court found that Stockham has a multi-plant complex in Birmingham that is, in effect, six plants in one, comprised of a cast iron fittings plant, a malleable iron fittings plant, a bronze valve plant, an iron valve plant, a steel valve plant, and a butterfly valve plant. That finding is overstated, for at least four of the twenty-two seniority departments at Stockham, valve machining and assembly, electrical, machine shop, and construction, extend over all or virtually all of the "plants".

The defendant unions, the Steelworkers and its Local, have been the bargaining unit representatives for the production and maintenance hourly employees at Stockham since 1944. A majority of the local union's members have been black since World War II, and a majority of the members of the Local's grievance committee and of its officers have been black since 1967. Plaintiffs James and Winston have been officers of the Local and participated in collective bargaining negotiations. The Steelworkers' staff representative who has aided the Local in contract negotiations is black.

All the plaintiffs were black hourly employees of Stockham. Patrick James, a high school graduate and a graduate of Booker T. Washington Business College, was hired as

a laborer at Stockham in 1950 and twenty-four years later at the time of trial was still working in that capacity. Howard Harville was hired in 1946 and worked as an arbor molder in the grey foundry until 1970 when he retired on a medical disability. Louis Winston was hired as a laborer for the galvanizing department in 1964, was transferred to the electrical department as a laborer in 1965, and in 1971 became one of the first blacks enrolled in the apprenticeship program.

B. *Organization*

1. Departments

By agreement with the Local, Stockham has maintained a formal departmental seniority system since 1949. There are twenty-two seniority departments. The foundry departments produce the basic materials and molds for Stockham's products (e. g. grey iron foundry, bronze foundry, and malleable foundry); other departments assemble, finish, and machine products (e. g. tapping room and valve machining and assembly); and another group of departments perform maintenance functions (e. g. electrical shop, machine shop, valve tool room, and construction).

Since 1965 the company has regularly employed approximately two hundred office and clerical personnel. In addition, the work force includes twenty-two non-union, salaried timekeepers. As of June 1973, there were also thirty-two plant guards. The Stockham sales department in Birmingham included twenty-two employees at the time of trial. At that time a total of forty-six salesmen were employed by Stockham throughout the country.

2. Wage Determinants

Within each seniority department bargaining unit jobs are divided into twelve job classes in ascending order of hourly wage from JC 2 to JC 13. These classifications re-

flect the increasingly complex nature of the jobs and the level of skill necessary to perform them. An employee's job classification determines his base pay rate. Other factors such as incentive earnings and merit raises also determine actual earnings. For each job classification there are different gradations of pay for non-incentive employees. Under Stockham's incentive system employees in highly repetitive jobs can add to their base pay if their work output reaches a sufficiently high level. A direct incentive worker's earnings averages approximately twenty-five percent above his base pay rate. Indirect incentive workers provide support services to direct incentive workers and receive incentive pay based on the output of the incentive workers. Non-incentive workers advance from one grade of pay to the next within a job classification if they achieve a predetermined score under a formal merit rating system. Although incentive workers are not eligible for merit pay raises, all employees receive merit ratings from their foremen every six months.

3. Advancement and Transfers

The merit scores received by both incentive and non-incentive employees become part of their personnel records; such ratings constitute one of the factors considered in promotion and training selection.[4]

Job vacancies have never been posted at Stockham and the company does not have a formal bidding system. In

[4] The supervising foreman rates an individual employee using the "personnel rating" form which requires an evaluation of seven factors: quantity and quality of work, job or trade knowledge, ability to learn, cooperation, dependability, industry, and attendance. The employee is rated on each factor as "unsatisfactory", "poor", "average", "superior", and "exceptional". Stockham's wage and salary administrator scores the form by assigning point values to each rating in each category. The defendant's expert testified that in 1973 blacks averaged 71.3 in merit ratings, whereas, whites averaged 79.5.

1965 Stockham instituted a "timely application" procedure that received a formal blessing in the 1970 collective bargaining agreement. An employee may ask his supervisor to prepare an application on his behalf for any job at Stockham, whether or not a vacancy for that job exists at the time of the application. The application is considered "timely" regardless of when the vacancy occurs. In filling vacancies company officials are not restricted to those employees who have filed timely applications. In practice many promotion and training selections are made in favor of employees who have not filed such applications.

Stockham administered the Wonderlic Test (discussed later in this opinion) to job applicants and employees seeking promotions and transfers from August 1965 until April 1971. To be considered for a position an employee was required to attain the Wonderlic score designated for the job. An employee seeking a job in a new department, another department from the one in which he was working, was required to obtain the higher "norm" score on the test; a worker seeking promotion within his own department was eligible for the job if he achieved the lower "minimum" score on the test, provided that he had attained "basic departmental job skills".

Under the seniority system at Stockham a senior employee is entitled to preference only when two or more competing workers possess the same degree of qualifications. An employee's foreman decides whether he meets this test and is entitled to promotion or training opportunities. This decision is totally within the discretion of the foreman and is not subject to review.

C. *Employment Practices*

1. Initial Job Assignments

According to company officials, it has been and still is the practice at Stockham for the initial job assignments of

new employees to be made by the supervisors, both superintendents and foremen, of the departments containing the vacancies. The personnel office at Stockham serves as a recruiting agency and interviews and screens job applicants. The supervisor of a department advises the personnel office of any need for additional employees, and he is informed when suitable applications are available for review. In some cases the supervisor will request a particular individual whom he knows has filed an application. In other cases the personnel office will present the supervisor with a group of applications for examination. The supervisor, either the foreman or superintendent depending on the department, makes the hiring decision, which is totally discretionary and without written guidelines. Supervisors usually accept approximately seventy-five percent of the applicants recommended by the personnel department.

2. Seniority System

As stated, a Stockham employee seeking a new job in his existing department or desiring to transfer to a position in another department may file a timely application. A supervisor fills the vacancy within his department from employees who have filed timely applications, other employees, and applicants from outside the company. If two Stockham applicants are about equal in qualifications, the collective bargaining agreement requires that the employee with the most departmental seniority be selected.

If other factors are equal, departmental seniority determines not only promotions but also lay-offs and recalls. A worker who transfers between departments is a new employee for purposes of promotion and regression in the transferee department. Before June 1970 if a worker transferred departments he immediately lost all seniority in his old department. In 1970 this requirement was modified in the collective bargaining agreement. An employee was given eighteen months after transfer to the new department to

decide if he wanted to return to his old department. If within that time he decided to return, he would be permitted to reenter his old department within twenty-four months of his transfer with his accumulated seniority. The 1973 collective agreement further modified these seniority provisions. If after eighteen months an employee elected to remain in the transferee department, then he would be allowed to retain his seniority in his old department solely for lay-offs, but only until he had been in the new department as long as he had been in the old. If he was laid off during this period, he would be permitted to return to his old department with his accumulated seniority.

The basic features of Stockham's seniority system have remained unchanged: (1) an employee who transfers between departments forfeits his accumulated seniority at some point; (2) an employee who transfers between departments is a new employee for all promotion and regression purposes; and (3) a departmental employee has preference over employees from other departments for promotion to all vacancies within his department.

3. Craft Training

Craft positions, defined by the company as jobs with classifications from JC 10 through JC 13, are filled through on-the-job training and the apprenticeship program. More skilled tradesmen are trained through the apprenticeship program at Stockham than exclusively through on-the-job training. The program at Stockham involves four years and nine thousand hours of training in shops and apprentice classes. There are no formal lines of progression for the craft jobs. The craft skilled maintenance positions include millwright, electrician, carpenter, patternmaker, blacksmith, and machinist. The craft skilled production jobs include box floor molder, ductile melter, oven operator, crane operator, heat treater, and service mechanic.

The foreman or superintendent of the department in which a craft vacancy occurs selects a candidate for the apprenticeship program. Although timely applications are filed for openings in the apprenticeship program, the supervisor may select an employee who has not filed an application. A majority of employees selected for the program between 1965 and 1971 had not filed timely applications. Apart from several specific requirements, there are no formal guidelines for the supervisor's selection; he considers such general factors as "desire" and "aptitude" for the craft position. The foreman or superintendent recommends his candidate for the apprenticeship program vacancy to the apprenticeship committee. As a practical matter, the committee approves the supervisor's selection virtually automatically.

The specific requirements for the apprenticeship program have changed over the years. From August 1965 until April 1971, an applicant for the program was required to score at least 18 on the Wonderlic Test. Also, beginning in 1953 employees were required to achieve a passing score on the Bennett Mechanical Test. In addition to the testing requirements, in 1970 the company instituted a thirty-year maximum age limit, excluding time spent in military service, and a requirement that the applicant have a high school education or its equivalent for eligibility in the program. Before 1970 a grammar school education was required. Company officials have the discretion to waive either the age or the high school education requirement and have done so for a few individuals.

4. Supervisory Selection

Supervisors of the seniority departments at Stockham are selected either directly from the hourly work force without specific training or after completion of one of two training programs maintained by the company. The personnel development program ("PDP"), established in

1960, is designed to train the company's own employees. Before 1969 the program was informal and unstructured; only three classes were held between 1960 and 1969. There is an allocation of positions in the program among the departments at Stockham and final selection of participants is made by superintendents and foremen. There are no formal, written guidelines for the selection of employee participants in the PDP. The management training program ("MTP") and its predecessor, the organizational apprenticeship program ("OAP"), were designed to train individuals with technical skills who could eventually assume positions in upper level management. The OAP was instituted in 1950 and replaced by the MTP in 1969. Under both programs Stockham recruited participants only from nearby predominantly white universities such as Auburn University, the University of Alabama, the University of Tennessee, Georgia Institute of Technology, and Samford University.

As for employees selected directly from the hourly work force the supervisory positions, specific training is not a prerequisite. The superintendent of a division that has a supervisory vacancy may select candidates for the position after consultation with the company's production manager. An employee may make a timely application for a supervisory position, but the overwhelming majority of the employees selected to be supervisors have never filed such an application. A majority of Stockham's foremen were promoted from the ranks of hourly workers.

A company official testified that the principal criterion for selecting a foreman is—"who is the best man for the job at the particular time?". Other considerations are the candidate's desire to be a foreman, work record, knowledge of the job, training, physical fitness, and common sense. Whether the candidate has a high school education is also considered although employees without high school educations have been selected as foremen and superintend-

ents. There are no specific written standards for the selection of supervisors.

5. Testing Program

In recent years at Stockham testing has come to play an increasingly large part in the selection of individuals for initial employment, training programs, promotion, and transfers. A large-scale testing program was initiated at Stockham in August 1965. Before then only the Bennett Mechanical Comprehension Test for screening apprentice program candidates was in use. In 1965 the company instituted the Wonderlic Personnel Test to screen applicants for initial hire, promotion, and transfer. In October 1966 Stockham formally adopted dual scoring standards for transfers to the three groups of job classes. As discussed above, the minimum score for intradepartmental job candidates was set at a lower level for each group of job classes than was the score for transfers between departments. The candidates for interdepartmental transfers were required to obtain the higher "norm" score while the intradepartmental job candidates were eligible for consideration if they achieved the "minimum" score, provided that they had developed "basic departmental job skills".[5] The "minimum" score was established by a committee composed of Stockham management personnel and the company attorney. No one in the group and no company official associated with the administration of the testing had training in the testing field. The Wonderlic Test was never validated at Stockham. In 1971, apparently as a result of the Supreme Court's decision in *Griggs* v. *Duke*

[5] The follcwing scoring requirements were established;

Job Class	"Minimum"	"Norm"
1-5	0	5
6-8	8	15
9-13	15	18

Power Co., 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, Stockham terminated its testing program.

In early 1973, however, the company hired Victor Tabaka, a management consultant, to develop new testing procedures for implementation at Stockham. In April 1973 Tabaka submitted his testing proposal to the company. According to Tabaka he validated the use of tests for specific jobs at Stockham by means of a "concurrent criterion" study. The district court found that the Tabaka tests were put into formal use at Stockham on July 17, 1973. But the company official responsible for employee testing testified that the Tabaka test had not been used in any employee selection decision at Stockham by the time of trial. He stated that the test was administered to employees only for the purpose of accumulating data. The Tabaka test was not proposed for use with supervisory, clerical, or other salaried jobs. In addition, Tabaka concluded that the test was not applicable to eighty-six additional job titles because the associated job aptitudes were not measurable by pen and pencil tests.[6]

III.

Discrimination, Adverse Impact, and the Business Necessity Doctrine

The plaintiffs-appellants raise a broad spectrum of issues in this appeal, challenging every aspect of the district court's finding that Stockham and the unions were not guilty of discriminatory employment practices.

A. *Segregated Facilities*

Segregation of many of Stockham's facilities and programs continued into the 1970's and, in some cases, until a few weeks before trial. In 1965 the system of total segre-

[6] The Wonderlic Test was used for these 86 jobs from 1965 to 1971.

gation extended to the entrance gates of the plant, employee identification numbers, pay windows, toilet facilities, the cafeteria, drinking fountains, the locker rooms, and bathhouses. In addition, the company-sponsored Young Men's Christian Association ("YMCA") had two boards and separate Bible classes, one board and one Bible class was composed of white members and the other board and Bible class of black members. In addition, there were racially separate company baseball and bowling teams.

Until 1969 all black hourly employees at Stockham had badge identification numbers ranging from 300 to 2999, while all white employees had badge numbers above 2999. Employees with numbers up to 2999, that is, the blacks, used one set of pay windows for cash payments; whereas, white employees with numbers greater than 2999 used another set of windows. In 1969 the company began to assign badge identification numbers by departments and in 1972 abandoned cash payments and the use of pay windows.

The partitions in the cafeteria,[7] toilets, and bathhouse,[8] the racial assignment of lockers, and the racially separate

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[7] The segregation in the cafeteria after 1965 was not total although the vast majority of white and black employees continued to eat on separate sides of the partition. The testimony of one black employee, Claude Chapman, Jr., who attempted to cross the barrier with a few fellow black employees in 1967 suggests the nature of the pressure exerted on blacks who failed to conform to custom:

> Q [Plaintiffs' attorney] Have you had any experience with segregated facilities at Stockham?
>
> A [Chapman] Yes. I've had some experience with the cafeteria that we have at Stockham.
>
> Q What years—what year or years did you have that—
>
> A In 1967, I believe, I was working at night at Stockham on Number One Unit as a Molder. I was one of the first to go in the cafeteria on the white side. We had two sides, white and colored.
>
> Q What do you mean one of the first? One of the first coloreds—
>
> A To go on the white side. I went in the cafeteria that night; about ten of us went in.
>
> Q Ten of us, black or white?
>
> A Ten blacks went in the cafeteria. We were served. We sat and we ate. And as we left, the guards followed us back to the plant. He didn't—they didn't say anything to us. He didn't say anything. He just walked up and down the line looking at all of us and we was at work. The next night the money sheets came out and they had a red X by everybody's name that participated in going in the cafeteria. So we went back in the cafeteria that night. So some of the fellows began to get annoyed about the X's. They started to ask me questions, "What's the X for?" I say, "Well, the X is nothing but something to annoy you. They're not going to say anything to you." So this went on for about a week. The superintendent at the time, his name was Mr. Stone. So after going to the cafeteria for a week, the next week we started again, still going in the cafeteria eating. So the foreman came down one night after we had came back to the cafeteria and said, "Well, Mr. Stone wants to see you in his office," say, "He wants all the fellows that participated in going in the cafeteria." So he say, "Now, you're not—you don't have to say anything," say, "I just merely want to talk with you fellows." So I told him, "Okay, I'll go." The rest of us fellows, we all went to his office. When we got in Mr. Stone's office, Mr. Stone say, "Fellows," say, "I don't want you to say anything, I just merely want to talk with you fellows." Well, he didn't say fellows. "Boys," say, "I want to talk with you boys." So he say, "is there anything wrong with the food on the other side?" He say, "If there is, let me know." We didn't say anything. He says, "You know, fellows," say, "Mr. Stockham been good to you people," says, "do you know Mr. Stockham has the only company that has had black boys around skid trucks and things for years?" He say, "I would just hate to see you fellows tear down overnight what took us 65 years to build." And after he said it, he started crying. He reared back and tears came out of his eyes. We still didn't say anything. He say, "If any of you fellows have anything you want to tell me about food or facilities that you think is different, let me know; other than that, I'm

YMCA boards were the subjects of a conciliation agreement between Stockham and the EEOC entered into January 21, 1974. In addition, the plaintiffs adduced testimony

at trial on the existence of racially separate toilet facilities for the seven female employees in the dispensary at Stockham.[9]

The district court denied an injunction against the continued segregation of facilities at Stockham because he concluded that the issue was "effectively resolved" by the conciliation agreement. 394 F.Supp. at 499. In addition, the court found that as to the two women's restrooms in the dispensary, the plaintiffs failed to establish racially discriminatory practices. 394 F.Supp. at 481.

The plaintiffs and the amicus EEOC contend that the district court erred in its finding that the conciliation agree-

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through. I just hate to see you boys tear down what it took 65 years to build out here." So after then a few of them stopped going. But they never tried to stop us from going then.

The cafeteria partition was finally removed one week before trial.

[8] Claude Chapman, Jr. also testified that the bathhouse partition was still in place at the time of trial:

Q [Plaintiffs' attorney] All right. Mr. Chapman, have you had any other experience with segregated facilities at Stockham?
A [Chapman] Well, the bathhouse is segregated.
THE COURT: Now?
A Yes, now. I had a—my committee chairman is white and he changed in a different side of the bathhouse. I had to go over one evening to see my committeeman and as I came out of the bathhouse I saw one of the guards standing looking at me real hard. He didn't say anything. They are still segregated now.
THE COURT: Do they have any signs on them?
A No sir, they don't have any signs on them.
THE COURT: They just have the facilities that have been traditionally used by the two different races?
A That's right.

[9] Mrs. Lola Short, a black dental hygienist, testified that when she started working at Stockham in 1971, she was instructed to share one of the women's bathrooms with her black co-worker. The five white female employees shared the other bathroom. Mrs. Short stated that this practice was continuing at the time of trial.

ment resolved all issues of segregated facilities at Stockham. The evidence of the two racially separate women's restrooms in the dispensary at Stockham supports this contention. That evidence and the showing of the company's intransigent resistance to desegregation of plant facilities and programs convinces us that the district court overrelied on the conciliation agreement. The plaintiffs and the EEOC request that this Court grant broad injunctive relief against the continued segregation of facilities at Stockham. We reserve that issue for our discussion in subsection "V.A." on the injunctive relief appropriate for this case.

B. *Job Allocations*

The plaintiffs-appellants and the amicus EEOC contend that the district court committed plain error in its finding that "Stockham has at no time made initial job assignments (either to departments or to specific jobs) on the basis of an employee's race." 394 F.Supp. at 455. We agree.

The evidence in the record of pre-Act assignment of employees to departments and jobs by race at Stockham is overwhelming. The plaintiffs adduced testimony from a variety of company officials that the racial allocation of jobs was the "general rule". E. Reeves Sims, the employee relations manager, testified:

Q [Plaintiffs' attorney] Mr. Sims, do you know of any job prior to 1965 which was manned by both black and white employees?
A [Sims] I can't remember one.

Q Mr. Sims, I'm referring to your deposition which was taken on the 6th day of November, 1973, to Page 146 and 147 starting on line 17.
A May I see it?

Q I was going to say——

MR. NEWTON: Right there.

Q Now, if I may, I will read the question. The question was, "Was there a time, Mr. Sims, when blacks were initially assigned to some jobs and whites were initially assigned to other jobs as a general rule? Answer: Was there a time? Question: Yes. Answer: Yes".
A As a general rule, yes, as a general rule. But you asked me another question in a different context, Mr. Goldstein.

Q And if we can continue then on 147, "And did this practice continue until 1965? Answer: Yes, sir".

Now. Mr. Sims, you say as a general rule that was true?
A (Nodding head affirmatively).

Q Can you think of any exceptions to that general rule?
A Not offhand right now, no sir.

. . . . . .

Q Now, Mr. Sims, this general rule which we have discussed about there being black jobs and white jobs at the company, is that written down anywhere?
A No sir.

Q How was it enforced, or how was it put into practice?
A It was in practice when I came to Stockham, and——

Q Would you just say it was a custom?
A Yes, sir, custom.

Harry M. Burns, vice-president for corporate products, confirmed that there were no jobs at Stockham before 1965 in which both black and white employees were working. Norman E. Carlisle, superintendent of the tapping room, and an employee at Stockham since 1942, reiterated this fact. Terrell G. Burt, manager of technical services, admitted that prior to 1965 only the best qualified whites were considered for clerical positions at Stockham.[10]

Finally, in addition to the uncontradicted testimony of company officials, the plaintiffs introduced evidence that in June 1965 *not one* of the several hundred hourly jobs at Stockham was filled by both a black and a white.[11] The plain-

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[10] In colloquies between the district judge and counsel during the trial the assignment of jobs by race at Stockham at least until 1965 was treated as established. For example, the record contains the following exchange between the plaintiffs' attorneys and the court:

MR. GOLDSTEIN: Your Honor, we have had testimony which amounts to being cumulative about the racial assignment and composition of jobs right up until 1970, '71, in various departments.

THE COURT: Yes. It does amount to being cumulative, that's right.

MR. GOLDSTEIN: And I think what Mr. Butler is asking is what effect this had on the witness.

THE COURT: Well, I'll let him answer it, but I would like for this cumulative testimony on all of these issues that are already so well proven; I would like for you not to go into them anymore because it's not necessary.

MR. BUTLER: I that's Your Honor's position, then I can strike that question and go on to something else.

THE COURT: I just said you could let him answer that question, but I would like to have the cooperation of counsel in keeping down the cumulative testimony when the thing is pretty well proven. It doesn't need to be hammered into my head.

[11] *See* Chart B of the text. The data contained in Charts A, B, C, and D, were compiled from the "McBee Forms" of employees working at Stockham in September 1973. These forms detail the work history of individual Stockham employees. Only the forms for employees still working at Stockham in September 1973 were available to the plaintiffs. Thus the employment histories of workers who left the company's employ before September 1973 are not contained in these statistics. We are nevertheless convinced that the data in these charts accurately reflect job assignment patterns at Stockham. During the trial the plaintiffs produced testimony from company officials on the employment patterns of all Stockham employees

tiffs augmented the evidence of racial staffing by jobs with statistics showing that in 1965 jobs for whole seniority departments were allocated on the basis of race. For example, eight of twenty departments [12] were 100 percent black in 1965 and two others were more than 95 percent black while two departments were 100 percent white and two additional ones were more than 85 percent white.[13] Further, in those departments staffed by black and white employees blacks were concentrated in jobs with the lowest job classifications. While no blacks worked in jobs classified in job class seven ("JC 7") or above, 95 percent of the white workers were employed in jobs classed above JC 6.[14] The employee relations manager, E. Reeves Sims, also testified that blacks were not hired for clerical positions until 1965.[15] In addition, there were no black timekeepers or guards at Stockham before 1965. The salesforce was all white at least until the time of trial.

In short, the record plainly demonstrates that the district court plainly erred in concluding that at no time were initial job assignments made on the basis of race at Stockham. The "custom" of job assignments by race at least until 1965 was established without contrary evidence. The testimony of Stockham officials that segregation within and between departments was the "rule" plus the plaintiffs' statistics on racial staffing discussed above establish con-

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during the relevant period. This evidence supplemented the data in the charts and confirmed the trends revealed in them.

[12] The purchasing and metallurgical seniority departments were omitted from the chart because of the relatively few employees, seven and three respectively, assigned to each department.

[13] *See* Chart A of the text. The statistics are based on employee "McBee Forms" discussed in footnote 11.

[14] *See* Chart D and the discussion of the source of the data in footnote 11.

[15] *See* Chart C.

clusively that Stockham engaged in racially motivated job assignments before 1965.

The plaintiffs carry their assertion of discrimination in job assignments into the post-Act period. They contend that all relevant evidence compels the conclusion that discrimination in job assignments continued at least until the time of trial. In support of their contention that racial allocation of employees by departments and by jobs within departments is the usual rule at Stockham the plaintiffs emphasize the patterns revealed by statistical evidence.

Chart A bears out this contention. Chart A presents data on the percentage of black employees working in each seniority department in 1973, as compared with the percentage of those employees working in each department in 1965.

CHART A

DEPARTMENTAL EMPLOYEES BY RACE

Seniority Departments	1965 B	1965 W	% B 1965	1973 B	1973 W	% B 1973
Galvanizing	9	0	100%	15	0	100%
Coreroom & Yard	24	0	100%	76	1	99%
Grey Iron Foundry	92	0	100%	292	16	95%
Final Inspection	16	0	100%	52	4	93%
Malleable	88	4	96%	259	19	93%
Brass Foundry	30	1	97%	59	8	88%
Shipping	22	0	100%	56	8	88%
Foundry Inspection	25	0	100%	56	9	86%
Dispatching	4	0	100%	27	7	79%
Brass Core Room	11	0	100%	11	3	79%
Tapping Room	53	16	77%	151	45	77%
Valve Finishing Insp.	8	4	67%	20	18	53%
Construction	5	6	45%	15	18	45%
Valve Machining & Assembly	76	36	68%	70	171	29%
Foundry Repairs	4	10	29%	12	55	18%
Machine Shop	3	9	25%	8	50	14%
Electrical	1	7	12%	2	19	10%
Pattern Shop	1	7	12%	3	37	8%
Valve Tool Room	0	5	0%	1	17	6%
Tapping Tool Room	0	11	0%	2	30	6%

Chart A reveals a slight reduction in racial staffing by departments between 1965 and 1973. Nevertheless, in 1973 eleven of the twenty departments [16] were predominantly black, while seven of the departments were predominantly white. Only two departments contained black and white employees in approximately equal numbers. As of September 1973 nine hundred and three or 72 percent of all blacks in the hourly work force in the departments of galvanizing,

[16] *See* footnote 12.

coreroom and yard, grey iron foundry, final inspection, malleable, brass foundry, shipping, foundry inspection, dispatching, and brass coreroom. Only 75 whites or 13 percent of all whites worked in those departments. In September 1973 thirty-six percent or 208 of all whites in the hourly work force and two percent or 28 of all blacks worked in the seniority departments of the tapping tool room, valve tool room, pattern shop, electrical shop, machine shop, and foundry repairs. Even more significantly, of the 162 employees hired since 1965 to work in predominantly white departments, and working as of September 1973, 147 or 90.7 percent were white; whereas, of the 624 hired since 1965 to work in predominently black departments, 624 or 89.8 percent were black.[17]

According to the plaintiffs, individual jobs at Stockham have also continued to be assigned largely on the basis of race. Chart B offers statistical support for this contention.

[17] These percentages are verified by the following table:

DEPARTMENTS IN WHICH EMPLOYEES HIRED SINCE 1965 WERE WORKING AS OF SEPTEMBER 1973 BY RACE

Predominantly White Departments	B	W
Tapping Tool Room	2	17
Valve Tool Room	0	9
Pattern Shop	2	26
Electrical Shop	1	13
Machine Shop	4	37
Foundry Repairs	6	45
	15	147

Predominantly Black Departments	B	W
Galvanizing	8	0
Coreroom and Yard	49	1
G. I. Foundry	218	16
Final Inspection	30	4
Malleable	181	15
Brass Foundry	34	8
Shipping	41	8
Foundry Inspection	37	9
Dispatching	23	7
Brass Core Room	3	3
	624	71

For a discussion of the source of this data *see* footnote 11.

CHART B
RACIAL STAFFING OF JOBS AT STOCKHAM*

SENIORITY DEPARTMENT	JUNE 1965			JUNE 1968			NOVEMBER 1970			JUNE 1973		
	AW	AB	BW	AW	AB	BW	AW	AB	BW	AW	AB	BW
Malleable	2	24	—	3	25	—	2	24	2	3	25	6
Brass Foundry	1	11	—	—	14	—	—	12	—	3	14	5
Grey Iron Foundry	—	29	—	2	37	—	2	36	—	5	41	3
Core Room & Yard	—	12	—	—	18	—	—	21	—	—	23	2
Pattern Shop	3	1	—	5	1	—	7	1	—	8	1	1
Valve Mach. & Assembly	20	20	—	17	13	1	16	15	3	18	18	6
Valve Tool Room	3	—	—	4	—	—	3	—	—	5	2	—
Electrical	4	1	—	5	1	—	6	1	—	4	1	2
Machine Shop	6	3	—	6	2	—	8	4	—	11	4	1
Foundry Repairs	3	2	—	3	1	—	4	1	—	5	—	2
Final Inspection	—	6	—	7	—	—	—	7	—	2	7	1
Foundry Inspection	—	6	—	—	5	—	—	7	1	—	8	3
Valve Finishing Inspection	3	6	—	2	6	1	2	6	1	6	9	3
Galvanizing	—	6	—	—	5	—	—	5	—	—	6	—
Tapping Room	5	5	—	5	9	3	2	11	3	2	15	7
Tapping Tool Room	4	—	—	4	—	—	4	—	—	4	—	—
Shipping	—	9	—	—	12	—	—	13	1	—	13	3
Dispatching	—	2	—	—	2	—	—	1	1	—	2	4
Metallurgical	—	—	—	—	1	—	—	1	—	1	1	—
Brass Core Room	—	7	—	—	7	—	—	9	—	—	6	3
Construction	3	3	—	4	3	1	6	4	1	5	3	2
Purchasing	—	—	—	—	1	—	—	3	—	1	2	—
Employment/Industrial	—	—	—	—	—	—	—	—	—	1	—	1
Plant Protection & Personnel Services	1	3	—	1	5	1	—	6	2	3	5	1
Medical	—	—	—	—	—	—	—	1	—	—	1	—
Y.M.C.A.	—	5	—	—	5	—	—	5	—	—	5	—
TOTAL	58	161	—	61	180	8	62	194	15	87	212	56
(Percentage of integrated jobs)			(0%)			(3%)			(6%)			(16%)

• "AW" designates jobs filled by white employees; "AB" designates jobs filled by black employees; "BW" designates integrated jobs.

The data reveal that while no jobs were staffed by both blacks and whites in any department in 1965, that pattern had improved only slightly by 1973 when only 16 percent of all production and maintenance jobs were integrated. In addition, much of the improvement came between November 1970 and June 1973, after the plaintiffs had brought this action in the district court and long after the initial EEOC charge was filed.[18]

The plaintiffs also make the point that post-Act racial allocation of job opportunities extended to clerical, timekeeper, and guard positions. Chart C gives the number of black and white clerical employees for selected years between 1966 and 1973.

CHART C

CLERICAL EMPLOYEES BY RACE

	1966	1968	1971	1973
White	193	200	184	189
Black	5	6	14	18
% black	2.5	2.9	7.1	8.7

Thus, in 1973 only 8.7 percent of clerical workers were black. In addition, although the company employs 22 timekeepers, only two blacks have ever been chosen for that job. About half of all timekeepers are selected from the hourly production and maintenance work force, which is 66 percent black. As of June 1973 there were 25 white plant guards and seven black guards. All three of the sergeants were white. Finally, in 1973 the company's Birmingham sales department had twenty-two employees; all were white.

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[18] As we have observed many times before: "[A]ctions taken in the face of litigation are equivocal in purpose, motive and permanence." *Jenkins v. United Gas Corp.*, 5 Cir. 1968, 400 F.2d 28, 33. *See also Rowe v. General Motors Corp.*, 5 Cir. 1972, 457 F.2d 348, 359; *Johnson v. Goodyear Tire & Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364, 1376-77 n.36; *Gamble v. Birmingham Southern Railroad Co.*, 5 Cir. 1975, 514 F.2d 678, 683.

The plaintiffs point out that in production and maintenance departments staffed with white and black employees, the blacks were principally concentrated in jobs with the lowest job classifications whereas whites worked largely in jobs with the highest job classifications. Chart D lists the job classes of white and black employees, working at Stockham in September 1973,[19] for four different time periods between June 1965 and June 1973.

CHART D

JOB CLASSES OF WHITE AND BLACK INCENTIVE AND NON-INCENTIVE WORKERS

INCENTIVE WORKERS

Job Class	June 1965		June 1968		Nov. 1970		June 1973	
	B	W	B	W	B	W	B	W
B9	0	5	0	1	0	11	2	22
B8	0	47	2	53	4	60	18	111
B7	0	4	18	1	23	1	70	9
B6	25	0	34	0	47	0	64	0
B5	134	0	214	1	235	1	279	11
B4	21	1	72	1	82	0	109	5
B3	89	0	80	0	94	0	102	4
B2	58	0	21	1	32	1	157	15
TOTALS	327	57	441	58	517	74	801	177

NON-INCENTIVE WORKERS

Job Class	June 1965		June 1968		Nov. 1970		June 1973	
	B	W	B	W	B	W	B	W
13	0	46	0	55	4	77	1	144
12	0	9	0	7	0	9	3	34
11	0	10	0	9	0	14	0	22

[19] *See* footnote 11 for an explanation of the source of the statistics.

Job Class	June 1965		June 1968		Nov. 1970		June 1973	
	B	W	B	W	B	W	B	W
10	0	5	0	14	0	14	2	30
9	0	24	2	34	3	42	9	52
8	0	2	1	4	3	6	7	7
7	0	2	1	5	2	11	24	24
6	2	9	16	11	19	8	27	25
5	103	3	108	1	129	5	143	9
4	8	0	11	0	15	1	40	1
3	31	0	43	1	45	0	56	5
2	34	0	59	3	61	2	190	14
TOTALS	178	110	239	144	281	189	502	367

Because base pay rates at Stockham are determined by job classifications, the data revealed in Chart D support the conclusion that lower-paying jobs were allocated to blacks at Stockham, at least until 1973. The plantiffs emphasize that the job class statistics reveal that of 366 white non-incentive workers, 274, or 75 percent, were in JC 9 or above while only 11, or 3 percent, of the 371 black non-incentive workers were in the higher job classes. Of the 178 white incentive workers, 135, or 76 percent, were in the two highest incentive job classes; whereas, only 20, or 2 percent, of the 872 black incentive workers were in JC 8 and 9. Further, the plaintiffs note that the average job class for blacks was substantially lower than the average job class for whites between 1965 and 1973.[20]

Further, the plaintiffs presented evidence of the disparities in black and white employee wages and gross earnings at Stockham. The job class differences between black and

[20] Below are statistics on the average job classes for black and white incentive and non-incentive workers between 1965 and 1973:

	INCENTIVE WORKERS		NON-INCENTIVE WORKERS		
	BLACKS	WHITES		BLACKS	WHITES
June 1965	3.94	7.95	June 1965	4.04	10.74
June 1968	4.50	7.78	June 1968	4.02	10.35
Nov. 1970	4.50	8.01	June 1970	4.25	10.51
June 1973	4.35	7.15	June 1973	3.90	10.23

white workers also reveal the disparities in base pay for blacks and whites; the pay rate for each job is determined by the job class in which the job is located. Non-incentive workers are paid at an established hourly rate. As of June 1973 the pay range for JC 2 was $2.85 to $3.30 per hour while the range for JC 13 was $3.66 to $4.47 per hour. An incentive worker is paid at a guaranteed base pay rate somewhat below that paid a non-incentive worker in the same job class. For example, the incentive rate for JC 2 is $2.85 per hour while it is $3.29 per hour for JC 9. An indirect incentive worker is guaranteed a slightly higher base pay rate and receives on the average less incentive pay than an employee on the direct incentive system. A direct incentive worker's pay averages approximately 25 percent above his base rate because of his incentive earnings. The exact amount of incentive pay varies with the productivity of the employee.

The plaintiffs showed that the average hourly earnings rate of black employees, including base, incentive, and overtime pay, as of September 1973 was $3.83, or $0.37 less per hour than the average earnings of white employees. Similarly, white employees averaged approximately 12.8 percent more in yearly gross earnings than black employees during the period from January 1, 1973, through September 1, 1973. These pay disparities existed in 1973 even though blacks had greater seniority on the average than whites. The average hiring year for black employees in September 1973 was late 1963; whereas, white employees had an average hiring year of mid-1965. These statistics on pay disparities demonstrate that blacks have been assigned to jobs with lower economic returns than have white employees.

Finally, the plaintiffs assert that blacks were assigned the least desirable jobs at Stockham both in terms of working conditions and the pressures associated with the work. Otto Carter, a white company superintendent, admitted that the hottest, dirtiest, and dustiest parts of the operation at

Stockham are the foundry departments, grey iron, malleable, and ductile. Of the 586 hourly employees in these departments as of September 1973, 551 or 94 percent were black.[21]

As we mentioned, the incentive pay system at Stockham applies to highly repetitive jobs.[22] Stockham's production manager, Jack Marsh, in describing the work of an employee on the incentive system stated: "[H]e does the same thing over and over." An employee receives incentive pay only if his production output exceeds the norm established by the company for the particular job. For this reason the pressures associated with incentive work at Stockham have led employees to call it "the racetrack".[23] As of

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[21] Illustrative of the work in these departments is the job of arbor molder in the grey iron foundry. Howard Harville, one of the named plaintiffs in this suit, worked until 1970 in that position. According to superintendent Otto Carter the job requires that an employee spend two or three hours a day on his knees, or on one knee with one leg tucked under him, on the hot molding floor imprinting a pattern into a sand bed. Harville was forced to retire in 1970 on a medical disability. No white worker was employed as an arbor molder until 1968 or 1969. Whites worked in the foundry departments, but only in jobs with the highest classifications. Until 1968 or 1969 the only white employees assigned to the grey iron foundry worked in the top job class positions on the box floor. Similarly, the only hourly position in the ductile foundry filled by a white employee was that of ductile furnace melter, a JC 12 position. As of trial there had never been a black crane operator, JC 11 in the 96 percent black malleable foundry.

[22] *See* subsection "II.B.2." of this opinion.

[23] Claude Chapman, Jr., a black employee at Stockham, testified:

> A [Chapman] . . . [I]t's a fast job, it's a job where you have to—you have to be running approximately eight hours in order to make any money.
>
> Q [Plaintiffs' attorney] What do you mean running?
>
> A Well, they usually call it the racetrack. You have to run. In other words, you have to average around 75 to 80 molds an

September 2, 1973, 70 percent of all black workers were assigned to incentive jobs as compared with only 31.7 percent of white employees. This concentration of blacks in incentive jobs and in the foundry departments supports the inference of discriminatory job assignments.

The pattern of job assignments at Stockham appears to result from a process that is largely subjective. First, employees are selected for individual seniority department jobs by departmental supervisors. The selection decision

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hour in order to get out of the red.

Q What do you mean get out of the red?

• • • • •

A You are an incentive worker. So what I mean by getting out of the red, you've got to put up at least 380 molds before you can start making the Bedaux.

Q What do you mean by Bedaux?

A Bedaux is what they call the incentives. [See below.] You run after that. In other words, they call that the ham bone with no meat.

• • • • •

A Well, when I say the ham bone, understand, when I say getting out of the red, say, for instance, if you work hard all day and you—say you put up 420 molds, well, you needed 380 to get out of the red, that's what I call putting the meat on the bone, but if that job—in other words, if we scraped below the 380, then you are still in the red. You've got to be a good molder. You only get paid for good molds, the good pieces that goes across the scale. The next morning you come to work, you done lost your molds, you done lost your meat, so you say, "Well, I ain't going to run today because I didn't make anything yesterday." But the foreman will say, "I gave you a ham bone. All you do is put some meat on it." That's why they call it the ham bone. So sometimes you'll reply and say, "Well, I'm tired of the ham bone, I want the meat from the start," Molding is hot, it's hard and it's fast and it's nasty. A lot of times—well, for instance, it took a year to get a fan and it's noisy, so noisy until every motor on Number One Unit is where you're required to wear ear plugs because the noise is above the noise level.

(Bedaux is the name of the incentive system used at Stockham.)

is totally discretionary and is not guided by written instructions.[24] Second, apart from testing and seniority requirements, the decision to promote or transfer an employee into a new department is discretionary with the appropriate departmental supervisor and there are no written standards for the selection process.[25] The supervisory staff at Stockham is composed overwhelmingly of whites,[26] and there are no safeguards against racial bias in the selection process.

In sum, even on the eve of trial the defendant Stockham discriminated in allocating jobs on the basis of race. A definite pattern of intentional racial staffing is revealed by statistical evidence on the disparities in black and white representation in seniority departments, on the relatively few integrated jobs in 1973, on the concentration of blacks in the lower job classes of both incentive and non-incentive jobs, and on the wage disparities between blacks and whites. In addition, it seems clear the undesirable working conditions associated with the jobs to which a vast majority of blacks are assigned verifies the contention that jobs are allocated on the basis of race. The statistics must be evaluated in light of the admitted total segregation of jobs at Stockham until 1965; the persistent segregation of facilities and programs at least until 1974; and the roles played by white supervisors in discretionary and subjective assignment, transfer, and promotion decisions. This evidence taken together establishes a prima facie case of intentional discrimination according to the amicus EEOC.

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[24] *See* subsection "II.C.1." of this opinion.

[25] The merit scoring system discussed in subsection "II.B.3." of this opinion appears to play little part in promotional decisions.

[26] Before 1971 there were no black supervisors. In 1973 five out of 120 foremen were black and none of the twenty-seven superintendents or six general foremen was black.

The plaintiff in an action under Title VII has the burden of establishing a prima facie case of discrimination in employment practices. That burden may be met with statistical proof when it reaches proportions comparable to those in this case. *Wade v. Mississippi Cooperative Extension Service*, 5 Cir. 1976, 528 F.2d 508, 516-17; *United States v. Hayes International Corp.* ("Hayes II"), 5 Cir. 1972, 456 F.2d 112, 120. *See also Pettway v. American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 225 n.34; *United States v. Jacksonville Terminal Co.*, 5 Cir. 1971, 451 F.2d 418, 442, 446, *cert. denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815. Indeed the Supreme Court has recently approved the use of statistical proof in establishing a prima facie case of racial discrimination in the trucking industry. "Statistics are equally competent in proving employment discrimination. . . . Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Brotherhood of Teamsters v. United States*, —— U.S. ——, —— and n.20, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) (Teamsters).

Here the plaintiffs have produced evidence of gross disparities in job allocations at Stockham on the basis of race. All but two of the seniority departments were either predominantly white or predominantly black at Stockham at the time of trial in 1973. Only sixteen percent of the hourly jobs were integrated by that time.[27] In 1973 the overwhelm-

[27] In *Pettway* this Court reversed a finding of no discrimination by the district court in partial reliance on statistics revealing that "[a]s late as 1971, only fifty-nine of 232 jobs were integrated—only 25% of the total." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 230.

ing majority of both incentive and non-incentive white workers were employed in jobs with the highest job classifications.

Blacks earn, on the average, $0.37 less per hour than whites, including overtime and incentive pay.[28] Seventy percent of all black employees work in the monotonous, pressurized conditions of the incentive system, and 94 percent of all workers subject to the hot, dusty, dirty conditions of the foundry departments are black. The disparities revealed by the statistics on job allocations at Stockham are gross and the statistical evidence compelling; they establish a clear prima facie case of purposeful discrimination.

The statistical patterns do not complete the plaintiffs' case. In addition, they offer persuasive evidence of total job segregation prior to 1965 and the intransigent retention of segregated facilties and programs at Stockham until at least 1974. As this Court recently observed through Judge Clark in *Swint* v. *Pullman-Standard*, 5 Cir. 1976, 539 F.2d 77, 97:

> [T]he prior history of discriminatory job class assignments is clearly relevant to the issue of whether the present discrepancies in departmental assignments were part and parcel of a broad scheme to treat black and white workers differently. Historical policies of racial discrimination have often been used by other courts as indicia of plant-wide discriminatory conduct. (Footnote omitted.)

[28] In *Watkins v. Scott Paper Co.*, 5 Cir. 1976, 530 F.2d 1159, 1165, this Court found a pay differential of $0.47 an hour for white and black employees a persuasive element of the plaintiffs' prima facie case on employment discrimination. *See also* the discussion of the relevance of interracial wage comparisons in Title VII cases in *Baxter v. Savannah Sugar Refining Corp.*, 5 Cir. 1974, 495 F.2d 437.

In erroneously concluding that Stockham has never discriminated in job assignments the district court did not have a finding of prior discriminatory job class assignments at Stockham on which to rely in evaluating the post-1965 statistical evidence. Nevertheless, the court had before it unrebutted evidence of post-Act policies of segregation in facilities and programs as indicia of discriminatory conduct on the part of Stockham. The district court erred in not relying on that evidence in evaluating the plaintiffs' case.

In *Bolton* v. *Murray Envelope Corp.*, 5 Cir. 1974, 493 F.2d 191, 195, this Court observed that the significance of statistical disparities between the races revealed in evidence of job assignment and employee discharges

> is magnified when appraised in light of the fact that [the defendant] has little, if any, initial job qualifications requirments. In nearly every situation, the hiring, initial job assignment, and promotion is almost exclusively a subjective determination made by white supervisors.

Here initial job assignments were made on the basis of decisions by white departmental supervisors[29] without any formal selection standards or written guidelines. Similarly, transfer decisions were made without objective standards by the largely white supervisory staff. For promotions, seniority controlled only when the supervisor decided that applicants were approximately equal in qualifications, a largely subjective decision made by predominantly white supervisors. In *Rowe* v. *General Motors Corp.*, 5 Cir. 1972, 457 F.2d 348, 359, this Court examined procedures involving subjective evaluations of employees:

> All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the

[29] *See* footnote 26.

> subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination . . . . We and others have expressed a skepticism that black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action.

See also Pettway v. American Cast Iron Pipe Co., 494 F.2d at 231-32; *United States v. Jacksonville Terminal Co.*, 451 F.2d at 442. In addition, in *Pettway* this Court emphasized that "[c]ourts have condemned procedures for promotion and job assignment which are not objective and uniform." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 232 n.47.

We conclude that the plaintiffs' evidence of racial disparities in job allocations after 1965, of total job segregation prior to 1965, of the continued segregation of facilities and programs until long after the effective date of Title VII, and of subjective assignment, transfer, and promotion decisions by white supervisors at Stockham make a *prima facie* case of discriminatory employment practices in job allocations at Stockham. Once the plaintiff in a Title VII case has presented a *prima facie* case of discrimination, the "onus of going forward with the evidence and the burden of persuasion" is on the defendant. *United States v. Hayes International Corp.*, 456 F.2d at 120. The strength of the evidence presented in this case imposes on the defendant a heavy burden in attempting to counter the inference of systematic and purposeful discrimination.

The defendant Stockham seeks to rebut any "colorable" inference of discrimination primarily by means of two arguments, both of which focus on the disparities in job classes of positions in which blacks and whites are employed. First, Stockham contends that an employee's job class has only a negligible impact upon employee earnings. In support of this argument the defendant points to four facts: (a)

that incentive workers earn approximately 25 percent more than their base pay rate, (b) that 75 employees in the production and maintenance unit making more than $9,000 a year in 1972, 40 of these persons were in job classes 9 and below, (c) that no JC 11 or 12 workers earned more than $9,000 in 1972, and (d) that some black employees earned more than white employees. The district court relied on these same facts in finding that Stockham has not engaged in discriminatory job assignments. These four facts are unpersuasive of the "negligible" impact of job class on employee earnings and largely irrelevant to the issue of present discrimination in job allocations. First, the evidence is uncontradicted that the job class in which a job is located determines the base pay rate for the job and that the lower the job class, the lower the pay rate. That incentive workers earn more than the base rates for their jobs does not refute the direct relationship between pay rate and job class. Further, that some incentive workers are industrious enough to earn more than $9,000 also does not refute the relationship. Moreover, that workers in JC 11 and 12 do not earn more than $9,000 suggests only that incentive pay augments base pay. More importantly, it suggests that incentive jobs may not be as desirable as the defendant would have us believe.[30] Workers obviously seek the skilled craft jobs in job classes 11 and 12 *even though* they are not on the incentive system and thus have built-in limitations in pay. In its argument the defendant overlooks the fact that many jobs in JC 11 and 12 serve as training grounds for JC 13 positions and thus have greater earnings potential over the long term than do incentive jobs with lower job classes.

Finally, Stockham attempts to show that whites in one of the higher-classified jobs, crane operator in the iron grey foundry, did not earn more than some of the blacks in that

[30] *See* the discussion of the pressures and tedium associated with incentive jobs in the text and note at footnote 23.

department working in lower job classifications. For example, as the plaintiffs point out, one white crane operator in 1972 earned less than 81 of the 292 blacks in the department. When the data are controlled for seniority, however, and the white crane operator's salary is compared with that of blacks hired the same year as he was, 1968; the evidence is more revealing. The white employee had a higher earning rate per hour than all but one black.

The defendant seeks to refute the plaintiffs' evidence that blacks earn an average of $0.37 less per hour than whites, including incentive and overtime pay, by means of the testimony of an expert witness. Dr. James Gwartney, an economist who testified for the defendant, conducted a study of the earnings of production and maintenance employees at Stockham in an attempt to determine the factors that explain earnings disparities between employees. He concluded that such productivity factors as education, skill, building experience, craft skill level, and absenteeism—not discrimination—explain the earnings differences between blacks and whites at Stockham. In studying the earnings opportunities at Stockham Dr. Gwartney considered four factors: (1) the earnings of employees at Stockham compared with the earnings of those in local, regional, and national labor markets and with earnings in other companies; (2) relative changes in the earnings of company employees over a long period of time; (3) relative changes in the earnings of company employees recently hired; and (4) application of the residual approach of scientifically adjusting earnings for productivity factors.

Dr. Gwartney's analysis does not meet the point that wage differences between blacks and whites at Stockham are explained by racially discriminatory job allocations. The first three factors are irrelevant to the question of discrimination at Stockham. The critical question is whether blacks at Stockham earn less than whites at Stock-

ham, not whether blacks at Stockham earn more or less than blacks in various other geographic areas or in other companies. Those statistics will suggest only whether there is more or less discrimination in earnings opportunities for blacks in other settings as compared with Stockham. In addition, such statistics are totally irrelevant to the issue whether blacks are segregated by jobs and departments at Stockham and to the issue whether blacks must earn their wages under conditions less desirable than those of whites.

On its face, Dr. Gwartney's fourth factor deals with relevant and persuasive statistics on earnings disparities between blacks and whites. His regression analysis of productivity factors will not stand scrutiny.

Regression analysis is a statistical method that permits analysis of a group of variables simultaneously as part of an attempt to explain a particular phenomenon, such as earnings disparities between blacks and whites. The method attempts to isolate the effects of various factors on the phenomenon. Dr. Gwartney's analysis is based on the assumption that productivity factors, not discrimination, may explain the wage differences between Stockham's black and white employees. The productivity factors Dr. Gwartney employed were years of schooling, achievement, seniority, skill level, outside craft experience, outside operative experience, absenteeism, and merit ratings.

The rub comes with how these factors were defined in Dr. Gwartney's study. As the plaintiffs point out, the critical factors of "skill level" and "merit rating" were defined in such a way as to incorporate discrimination. "Skill level" was derived from an employee's job class; he had "skill" only if he worked in a job with a rating between JC 10 and 13. The systematic exclusion of blacks from promotion and training opportunities for such jobs, as is alleged here, will automatically produce no black employees with "skill level". A regression analysis defining "skill

level" in that way thus may confirm the existence of employment discrimination practices that result in higher earnings for whites.

Dr. Gwartney used the merit ratings of Stockham supervisors, who are overwhelmingly white, for his "merit rating" factor; blacks average 71.3 in these ratings while whites average 79.3. If there is racial bias in the subjective evaluations of white supervisors, then that bias will be injected into Dr. Gwartney's earnings analysis.[31]

Further, Dr. Gwartney included education as one of his productivity factors, even though education is not a job requirement at Stockham, because, according to the defendant, "an individual's educational level, regardless of race, impacts earnings". The fallacy in this conclusion stems from two facts: (1) as the defendant concedes, education is not a job requirement at Stockham, and (2) white employees at Stockham have more education than blacks.[32] Thus, adjusting for education in a regression analysis of earnings where education is not related to job performance and where one race is more educationally disadvantaged than another, masks racial differences in earnings that may be explainable on the basis of discrimination. Certainly such differences cannot fairly be explained on the basis of a factor, such as education, concededly irrelevant to adequate job performance.[33]

Significantly, although Dr. Gwaltney asserted that his study proves that productivity factors and not discrimina-

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[31] Dr. Gwartney conceded that racial bias in supervisory ratings would have an adverse effect on the earnings of blacks.

[32] Only 774 of 1546 or 50.1 percent of black foundry workers have a high school education; whereas, 61.51 percent or 448 of 728 of white hourly employees have received a high school diploma.

[33] *See* the discussion *infra* at subsection "III.D.3" of this opinion on the job relatedness of the high school education requirement for craft training.

tion explain the wage differences between black and white employees at Stockham, he concedes that he made no attempt to control or check for racial bias in his analysis. Our examination of his analytical approach compels us to conclude that the results of Dr. Gwartney's study in no way refutes the plaintiffs' prima facie case of racial discrimination in job allocations at Stockham.

Stockham's attempt to refute the plaintiffs' evidence of racial job allocations by focusing on earnings differences misses the point. First, such an emphasis ignores the lopsided statistics on the number of all-black and all-white jobs at Stockham. Second, the defendant's focus on earnings avoids consideration of whether job segregation by itself, apart from any issue of economic harm, violates Title VII. This Court recently ruled on this issue in *Swint v. Pullman-Standard,* 539 F.2d at 89-90, in an opinion by Judge Clark:

> [A] Title VII plaintiff does not have to show economic loss to prove discrimination.
>
> . . . The key for this case is whether there was past discrimination . . . . Going further and requiring plaintiffs to prove that past assignment practices produced lower pay checks is contrary to law and precedent. . . .
>
> Title VII contains neither requirement nor implication that economic harm must be shown before a class can be found to have made out a prima facie case of racially discriminatory job assignment. Indeed, the statutory prohibitions of the enactment are explicitly broader than economic harm.

Thus, not only is the defendant's attempt to rebut the inferences of discrimination presented by the plaintiffs' evidence factually inadequate, it is also legally insufficient.

The defendant seeks to augment its rebuttal of the plaintiffs' *prima facie* case with a second argument on the issue

of the working conditions associated with departments and jobs in which blacks work. The defendant's rely in part on the finding of the district court that the plaintiffs' allegation that blacks work in the hottest, dirtiest, and dustiest jobs at Stockham is unsupported. We have previously discussed the evidence offered by the plaintiffs to substantiate this assertion.[34] We reject the conclusion that the allegation is unsupported.

In addition, the defendant contends that the plaintiffs failed to establish any correspondence between job classifications and work conditions. Stockham argues that many of the job class 10 through 13 positions held at Stockham by whites involve working conditions similar to the ones described by the plaintiffs. This argument does not reach the evidence that an overwhelming majority of blacks work in the tedious and pressure-filled atmosphere of incentive jobs while a substantial majority of whites do not. In addition, this argument in effect confirms another of the plaintiffs' contentions, that even in the largely all-black foundries the few jobs held by whites are the ones in the highest job classes. Even more significantly, this defense, focusing on the relative desirability of jobs and departments, like the defendant's emphasis on earnings data, is legally irrelevant. In *Swint* we made clear that departmental desirability is not an essential part of a plaintiff's prima facie proof. *Swint v. Pullman-Standard,* 539 F.2d at 91. In *Reed v. Arlington Hotel Co., Inc.,* 8 Cir. 1973, 476 F.2d 721, 723, discussed in *Swint,* the Eighth Circuit concluded: "[S]tatistics which show segregated departments and job classifications establish a violation of Title VII." Along with that court, our concern is that black employees have suffered "the indignities of segregation". *Id.* at 726. Here the plaintiff presents undeniable evidence of segregated jobs, the concentration of blacks in certain departments, the lengthy unlawful segregation of facilities and

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[34] *See* text and footnote 23.

programs, the admitted total allocation of jobs on the basis of race before 1965, and the subjective selection of employees for assignment, transfer, and promotion by an overwhelmingly white supervisory staff. Evidence of disparities in the earnings and working conditions of blacks and whites are persuasive, as in this case, but unnecessary to a determination that Title VII has been violated in the allocation of jobs on the basis of race.

The district court bases its holding that Stockham did not discriminate in job assignments after 1965 essentially on two conclusions: (1) that blacks were not qualified for more skilled positions and (2) that blacks voluntarily chose the jobs to which they were assigned. The EEOC points out the dearth of factual support for the court's reasons. First, the court relies on the testimony of Flount R. Hammock, manager of the Alabama State Employment Service in Birmingham, in support of its first conclusion. But Hammock stated: "[W]hen we're talking about skilled trade, there are very few white or black available." Thus the court's first factual conclusion is clearly erroneous. In addition, Stockham trains a substantial number of all craftsmen it employs at Stockham.

In support of its conclusion that blacks were assigned to positions they requested or preferred, the district judge stated:

> Of the 626 employees (251 white and 375 black) employed as of January 1, 1974, who had sought a specific job when applying to Stockham for employment, 61% of the white employees and 53% of the black employees were placed in the job of their own selection.

394 F.Supp. at 455. As th EEOC correctly observes, these statistics are factually insufficient and legally irrelevant. First, over two-thirds of Stockham's work force has been assigned to jobs without assignment requests. In addition, these statistics do not reflect the number of blacks not hired

at Stockham who sought traditionally white jobs and were rejected. Further, the statistics do not include information on the number of blacks who sought to transfer to jobs in traditionally white departments or positions after having worked for a time at Stockham. Finally, this Court has frequently recognized the "meaningless request" phenomenon. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 232; *Bing v. Roadway Express, Inc.*, 5 Cir. 1973, 485 F.2d 441, 451. Recently, in *Teamsters*, —— U.S. at ——, 97 S.Ct. at 1870, the Supreme Court observed:

> [A] nonapplicant can be a victim of unlawful discrimination . . . when an application would have been a useless act serving only to confirm a discriminatee's knowledge that the job he wanted was unavailable to him.

The district court's reliance cn the percentage of requests for specific jobs granted new black employees is legally misplaced in cases such as the one before us.

We hold that the district court erred in concluding that jobs have never been allocated on the basis of race at Stockham. There is overwhelming evidence in the record of past and present discrimination in the allocation of jobs in violation of Title VII.

C. *Testing Program*

1. Wonderlic Personnel Test

Although only the Bennett Mechanical Comprehension Test for screening apprentice program candidates was in use before 1965, in August of that year, just after Title VII became effective, Stockham instituted an extensive testing program. The company adopted the Wonderlic Personnel Test for use in screening virtually all applicants for hourly jobs at Stockham, new hirees, employees seeking intra- and interdepartmental transfers and promotions,

and individuals requesting selection for the apprentice program. The Wonderlic Test was employed at Stockham as a screening device until 1971.

The plaintiffs say that the district court erred in failing to find that Stockham's Wonderlic testing program was unlawful. The district court found:

> Plaintiffs have not offered any competent evidence, direct or indirect that the Wonderlic test, as administered at Stockham in the period from 1965 through 1971, disqualified a disproportionate number of black applicants or employees. In the absence of evidence of a racially disproportionate impact, the defendant-employer was under no obligation to go forward and prove that the Wonderlic test, as administered during that period, was job-related.

394 F.Supp. at 498. The defendant concedes that the Wonderlic Test was never validated. Stockham did not offer evidence of the job-relatedness of the test, but as the Supreme Court observed in *Albemarle Paper Co. v. Moody*, 1975, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280:

> This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.

The primary issue here in relation to the Wonderlic Test is whether the plaintiffs produced sufficient evidence of the adverse impact of the test on black employees at Stockham.

The plaintiffs' evidence on the racial impact of the Wonderlic Test consists of five elements. First, on cross-examination Dr. Joan Haworth, the defendant's statistician,

stated that in a computer study she conducted at Stockham's request she found that black employees at Stockham scored lower than white employees.[35] Second, E. F. Wonderlic & Associates, the developers and publishers of the Wonderlic Test, undertook a nationwide study on "Negro norms" and concluded that over a wide range of educational levels, jobs, and geographic areas there is a "stable differential" in black and white scores on the test with blacks scoring approximately eight points lower than whites.[36] *See* 394 F. Supp. at 482. Third, the plaintiffs produced expert testimony that blacks tend to perform less well on general intelligence tests, such as the Wonderlic, than whites do. Fourth, the Wonderlic Test has been condemned in a number of cases for having an adverse impact

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[35] Dr. Joan Haworth gathered and analyzed some of the data used by Dr. James Gwartney in connection with his earnings study discussed in subsection "III.B." of this opinion. She testified:

> Q [Plaintiffs' attorney] Did you make any comparison of scores on the Wonderlic by race?
> A [Dr. Haworth] Yes.
> Q And is that reflected in Dr. Gwartney's charts which are marked Exhibit 1 through 34?
> A I do not recall seeing that reflected there.
> Q What was the result of your study of the Wonderlic?
> A I do not remember the numbers.
> Q Did blacks do as well as whites?
> A No.
> Q Did they do substantially worse?
> A I can't tell that. I just don't—
> Q Well, that's a difficult question anyway.
> A I just don't remember.
> Q You remember though they didn't do as well as whites?
> A I do remember that there was a difference between whites and blacks and the blacks were not as high as whites.

[36] The study undertaken by E. F. Wonderlic & Associates, Inc., "Negro Norms, A Study of 38,452 Job Applications for Affirmative Action Programs" (1970), revealed a median score for blacks on the test of 15 while the median score for whites was 23.

on blacks.[37] Fifth, the plaintiffs' evidence showed that disproportionately few blacks were selected for jobs or training programs for which high Wonderlic scores were required.[38]

The district court rejected the plaintiffs' evidence on the adverse impact of the Wonderlic Test for a variety of reasons. *See* 394 F.Supp. at 482-83. The court's principal reason for this finding was that the plaintiffs failed to present any evidence "to the effect that the average score of blacks at Stockham on the Wonderlic Test was any lower from the average score of whites" except for the testimony of Dr. Haworth, which the court concluded was incomplete and therefore insufficient. In addition, the court found:

[37] In *Watkins v. Scott Paper Co.*, 530 F.2d at 1185, we observed: "Although the Wonderlic Test was recommended to Scott by the OFCC, this test has been shown to be discriminatory in impact in a number of other Title VII cases." *See, e. g., Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Johnson v. Goodyear Tire and Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364.

[38] A score of 15 was required for all jobs in JC 6 through 8. A score of 18 was required for the apprenticeship program, 19 for jobs in JC 9 through JC 13, and 20 for clerical positions. (The requisite scores for production and maintenance jobs were lower for intradepartmental transfers and promotions. *See* note 5 *supra*.) While the Wonderlic was administered at Stockham between August 1965 and March 1971, no blacks were chosen for the apprenticeship program. The first black employees were selected in April 1971. In 1971 14 of 198 clerical workers were black. Similarly, the following chart suggests the disparities between black and white employees in jobs for which higher Wonderlic scores were required:

Job Classes	Wonderlic Score Required	No. of Blacks	% of All Black Workers	Whites No. of	% of All White Workers
2-5	5	693	87	10	4
6-8	15	98	12	86	33
9-13	19	7	1	167	63

These statistics show that 96 percent of all white employees at Stockham were in jobs for which a Wonderlic score of 15 or higher was required; whereas, only 13 percent of all black workers were in such jobs.

> Plaintiffs failed to relate any supposed difference in test performance by blacks and whites to the Wonderlic cutoff scores actually utilized by Stockham from 1965 to 1971.

394 F.Supp. at 483.

The court gave too much weight to the plaintiffs' failure to offer evidence on the actual scores black and white employees at Stockham achieved on the Wonderlic Test.[39] In *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 221, we concluded that the plaintiffs had shown that testing and

[39] This emphasis was particularly misplaced in this case. Stockham did not maintain a log of test scores, and the plaintiffs could have presented the evidence required by the district court only after a search of thousands of active and inactive employee personnel files. That the requisite data were more readily available to Stockham is apparent from the following testimony by the defendant's statistician:

> Q [Plaintiffs' attorney] All right. Why did you—Dr. Gwartney told you to make a run of the test score by race?
> A [Dr. Joan Haworth] No.
> Q You did that yourself?
> A No, Mr. [W. M.] Warren asked me to do that.
> Q Do you recall when you made that run?
> A Sometime in the last thirty days, I would think.
> Q But that isn't reflected in any documents?
> A Not to the best of my knowledge.
> Q You have informed Mr. Warren though of the results of your study?
> A I have told him, yes.
> Q And did you send him a written—the written results of your study?
> A No, I didn't.
> Q Did you tell him the exact numbers, scores of what the average was for whites and blacks?
> A I believe—I don't know. I can't recall.

(Warren is a practicing attorney who represented Stockham in this action and worked with Dr. Gwartney on the earnings study.)

educational requirements had an adverse impact on black employees seeking promotions with evidence that fewer black employees were promoted between 1965 and 1971. Here the plaintiffs presented substantial statistical data on the gross disparities between the number of black and white workers in jobs requiring higher Wonderlic scores.[40] This Court recognized in *Watkins v. Scott Paper Co.*, 530 F.2d at 1185:

> [A] statistical showing of black exclusion from a particular kind of job establishes a prima facie case of discrimination.

See also Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission, 2 Cir. 1973, 490 F.2d 387, 393, in which Judge Friendly rejected any requirement that the racially disproportionate impact of employment tests be proved with "complete mathematical certainty".

The plaintiffs' statistical evidence shows that in three kinds of positions for which high Wonderlic scores were required black employees were greatly underrepresented. Although 66 percent of all production and mainteinance workers were black, in November 1970 only 29 percent of employees working in jobs with a JC 9 through 13 rating were black.[41] In addition, as we have already observed,[42] the statistics show that 96 percent of all white employees at Stockham were in jobs requiring a score of 15 or higher while only 13 percent of the black workers were in such jobs. Even more strikingly, there were no black apprentices in March 1971 when use of the Wonderlic Test was discontinued. Finally, 56 percent of the entire work force at

[40] *See* footnote 38.

[41] These statistics are based on employee "McBee forms". See the discussion in footnote 11.

[42] *See* footnote 38.

Stockham is black although only 7 percent of the clerical workers were black in 1971. These statistics show that during the period the Wonderlic Test was administered blacks were totally excluded from the apprenticeship program, were substantially excluded from clerical jobs, and were disproportionately excluded from jobs classified in JC 9 through 13.

This evidence, considered with Dr. Haworth's general finding that blacks scored lower on the Wonderlic Test at Stockham, the results of the "Negro norms" study by Wonderlic & Associates, and the expert testimony that general intelligence tests such as the Wonderlic generally have disparate effect on blacks establishes that the plaintiffs met their initial burden of showing that the Wonderlic Personnel Test had an adverse impact on black employees at Stockham. The district court erred in reaching the contrary conclusion. Given the adverse effect, the burden of persuasion shifted to the company to show the job relatedness of the test. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 222. Stockham offered no evidence to satisfy that burden. As a result, the plaintiffs are entitled to equitable relief.[43]

[43] The plaintiffs also challenge the lawfulness of the Wonderlic testing program at Stockham. They contend that a company that has previously excluded blacks from jobs on the basis of race cannot lawfully continue to exclude those blacks on the basis of criteria not applied to whites during the period of racial allocation of opportunity. This objection to the testing requirements imposed by Stockham for all job selection decisions made between August 1965 and March 1971 is based on the EEOC Guideline on "disparate treatment", 29 C.F.R. § 1607.11 (1974), which provides in part:

> Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or

Alternatively, apart from the issue whether the test itself had a discriminatory effect on blacks, the plaintiffs and the amicus EEOC argue that the way in which the Wonderlic test was administered with a dual scoring system for inter- and intradepartmental transfers, constituted an "artificial, arbitrary, and unnecessary" barrier to employment opportunities condemned by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. at 431, 91 S.Ct. 849. As we have already discussed,[44] Stockham required employ-

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applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by Title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

In *Nance v. Union Carbide Corp., Consumer Products Division*, 4 Cir. 1976, 540 F.2d 718, 728, the Fourth Circuit evaluated this guideline and concluded:

> Such guidelines, while not binding on the courts, are to be given great deference. We find them reasonable and fair and consonant with the purposes of Title VII *et seq.* (Footnote omitted.)

See also Watkins v. Scott Paper Co., 530 F.2d at 1178 n. 27, and the cases cited therein, in which we expressed general approval of the guideline. The logic of Guideline 1607.11 is similar to that behind this Court's condemnation of the use of a test to screen applicants for skilled jobs when the incumbent employees are not also required to pass the examination. As we observed in *United States v. Jacksonville Terminal Co.*, 451 F.2d at 456-57:

> If test scores and job performance are truly concomitant, those performing satisfactorily in group 1 positions should have achieved the higher scores. There can be no rational justification for exempting these group 1 employees without granting identical immunity to their group 3 contemporaries.

Nevertheless, here we do not need to reach the question of whether a violation of EEOC Guideline 1607.11 is a *per se* violation of Title VII. We have already declared the Wonderlic testing program unlawful on the ground that it adversely affected blacks seeking employment in jobs for which higher scores were required and was not shown to be job-related.

[44] *See* subsections "II.C.3." and "II.C.5." and note 5 *supra*.

ees transferring to jobs within their own departments to achieve the "minimum" score designated for the job; whereas, employees transferring interdepartmentally were required to achieve the higher "norm" score for the position. As the EEOC points out, the effect was that black employees who had been excluded from certain departments on account of race were required to score higher on the screening test than whites who never suffered such discrimination. Thus, this requirement tended to restrict blacks to departments to which they had been discriminatorily assigned. The requirement was arbitrary, in that an employee who achieved the "minimum" score was deemed qualified to perform the job. Further, if the purpose of the requirement was to adjust for the greater intradepartmental experience of employees already working in the department, that rationale is questionable. Stockham has no lines of progression among jobs; hence, experience in one job is not seen as necessary for satisfactory performance in another. Intradepartmental experience could have been considered as a separate criterion with more accurate results than with an adjustment to scoring on a general intelligence test.

Finally, the company apparently recognized that there was only a minimal relationship between satisfactory job performance and high scoring on the Wonderlic Personnel Test; an employee performing well within a department was not required to achieve a high score to be selected for another job in that department. This fact may explain why Stockham did not attempt to show the job-relatedness of the Wonderlic test. This Court's conclusion in *Pettway* on a preferential bidding system applies equally well here:

> The requirement that bids from *within* the craft departments be given initial, primary consideration must fail in light of the proof demonstrating that a large majority of black employees have been excluded from these departments.

Pettway v. American Cast Iron Pipe Co., 494 F.2d at 240. Therefore, the dual scoring system for the Wonderlic test, giving preference to employees transferring within departments, was unlawful even apart from the issue of the unlawfulness of the test itself.

2. Tabaka Testing Program

The district court found that the Tabaka tests had been in use at Stockham since July 17, 1973. The court also concluded:

> The Tabaka tests are actively considered in selection decisions; however, no employee has been disqualified on the basis of the Tabaka tests, even though some have failed to attain the failure probability score.

394 F.Supp. at 486. The plaintiffs, however, say that they were stymied in their efforts to collect information on whether the Tabaka tests adversely affect blacks because of the emphatic assertion of Stockham's employee testing manager that the Tabaka tests have not been used in any employment decisions.

The district court's finding that the Tabaka tests have been in use since July 17, 1973, is apparently based on the testimony of E. Reeves Sims, the company employee relations manager. We have concluded that the factual finding is clearly erroneous. Jack H. Adamson, whose direct responsibilities include Stockham's testing program, testified that the tests were administered only for the purpose of collecting data on their effect and not as part of employee selection decisions.[45] Therefore, we do not reach the ques-

[45] Adamson testified:

> Q [Plaintiffs' attorney] . . . Mr. Adamson, does anybody who has any responsibility for promotion at the company evaluate an employee's Tabaka scores as a judge of his abilities or in anyway use those scores in a determination of whether he'll get the promotion?
> A [Adamson] Not to my knowledge in anyway, sir.
> Q It hasn't been used yet?
> A No, sir.
> Q As far as—
> A No, sir.
> Q As far as you know, they have just been used to accumulate data?
> A They have not been used in employment; it has not been used in transfer; and it has not been used in promotion.
> Q So, as far as you know, they are just being used now to accumulate data which has been accumulated in the log, is that true?
> A Yes, sir, I told you this earlier.
> Q Okay. And there's no exception to that that you know of?
> A No, sir, none that I know of.
> Q Okay.
> A And I'm responsible for it. I think I would know it.
> • • • • •
> Q Mr. Adamson, over lunch have you thought about your testimony, and do you want to change any of your testimony that you gave this morning?
> A In relation to what, sir?
> • • • • •
> Q Specifically then with respect to the fact that neither you or I should say anyone who has been responsible for promoting employees to a job or transferring employees to a job has taken into consideration the scores that an employee receives on the Tabaka Tests.
> A I think I stand on what I said explicitly, yes, sir.
> Q Your answer was that no one took the Tabaka Tests into consideration?
> A That is true, sir.

During oral argument the defendant Stockham's attorney suggested that because Adamson's testimony is ambiguous, we should yield to the determination of the district judge who was present when the testimony was given. We disagree with counsel's factual assumption that the testimony is subject to different interpretations. It is difficult to imagine a more definite statement that the company has not used the tests for employment decisions.

tion whether Stockham has succeeded in proving the job relatedness of the Tabaka tests. Instead, we remand that

issue to the district court so that additional evidence can be taken. In more than three years since the trial, the company must have accumulated a substantial quantity of data. Such statistical information should be sufficient both for a determination of whether Tabaka tests have an adverse impact on blacks and for augmentation of the validation study.

If the district court finds on remand that the Tabaka test has an adverse impact on blacks, then it should evaluate the defendant's proof of job relatedness in light of the Supreme Court's opinion in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280. In addition, if the defendant continues to rely on the Tabaka concurrent criterion study as the basis for its assertion that the tests are job-related, the district court should consider whether the job analysis conducted by Victor Tabaka meets EEOC requirements specified in 29 C.F.R. § 1607.5(b)(3) and (4) and conforms with the professional standards of the American Psychological Association ("APA"). In *United States v. City of Chicago,* 7 Cir. 1977, 549 F.2d 415, 431, the Seventh Circuit applied the EEOC Guidelines and quoted the APA standards in emphasizing the importance of the quality of criteria chosen for criterion-related validity studies:

> [T]he logic of criterion-related validity assumes that the criterion possess validity. All too often, tests are validated against any available criterion with no corresponding investigation of the criterion itself. The merit of a criterion-related validity study depends on the appropriateness and the quality of the criterion chosen. . . . Criterion-related validity studies based on the 'criterion at hand' chosen more for availability than for a place in a carefully reasoned hypothesis, are to be deplored.

As that court concluded, "The entire rationale of a criterion-related study requires that the criterion with which

the test results are compared be a good measure of job performance." Id. at 433.

Finally, in the event the district court should conclude that the Tabaka tests are job-related, the court should permit the plaintiffs to present evidence that alternative selection devices, without similarly undesirable racial effect, are available to the company. *Albemarle Paper Co. v. Moody,* 422 U.S. at 436, 95 S.Ct. 2362. We remand the issue of the lawfulness of the Tabaka tests to the district court.

D. *Selection and Training of Craftsmen*

The plaintiffs and EEOC insist that the district court erred in holding that Stockham has never discriminated against blacks in the selection and training of craftsmen. In essence they say that the company's practices with regard to craft positions contain elements of present discrimination and "neutral" policies which perpetuate past bias in hiring.

First, the plaintiffs contend that the same discriminatory practices that denied blacks particular jobs and positions in certain departments have denied blacks training and advancement to craft positions. They point to evidence of the gross statistical disparities in the number of black and white craftsmen and the total exclusion of blacks from craft training programs until April, 1971. Second, the plaintiffs and the amicus point to the screening requirements used by Stockham in selecting employees for the apprenticeship training program. Since 1953 a passing score on the Bennett Mechanical Test has been required. Between 1965 and 1971 a score of 18 on the Wonderlic Personnel Test was required. Since 1970 an applicant for apprentice training has been required to have a high school diploma, or its equivalent, and to be thirty years old or younger, excluding time in military service. Finally, the plaintiffs stress the total discretion of an overwhelmingly white super-

visory staff in selecting employees for the apprenticeship program and for on-the-job training.

In response to these contentions the defendants emphasize the trial court's finding that the plaintiffs failed to show a single instance involving the company's failure to select a qualified black craftsman in favor of an equally or less qualified white. In addition, the defendant stresses the differences in skill level and productivity between black and white employees allegedly revealed by the regression analysis of earnings differences in the study conducted by Dr. Gwartney. We have already discussed the Gwartney study and rejected it as a basis for rebutting the prima facie of discrimination established by the plaintiffs' evidence.[46] That analysis applies equally well here. The defendant's first argument, that the plaintiffs have failed to show that a qualified black has been rejected for craft training, is legally irrelevant. In *Rowe v. General Motors, supra,* 457 F.2d at 355 n.14, we explained how the burden of proof is allocated in Title VII cases:

> The Trial Court took the simple position that the employees failed to carry the burden of establishing that GMAD maintained a policy of discrimination in employment practices .... [with *Griggs*] the Supreme Court has made clear that the employer has the burden of showing that any given requirement which has a tendency to reduce job opportunity because of race has a demonstrable relationship to the employment in question. *Griggs*, supra, 401 U.S. at 431, 91 S.Ct. [849] at 853, 28 L.Ed.2d at 164.

Thus, the trial court here concluded that the plaintiffs failed to meet their burden of proof under an erroneous view of controlling legal principles.[47]

[46] *See* subsection "III.B." of this opinion.

[47] As a result, the clearly erroneous standard of Rule 52(a), F.R.Civ.P., does not apply to this finding. *Rowe v. General Motors Corp.*, 457 F.2d at 356 n.15. *See* footnote 1.

We must examine the requirements and procedures for selecting employees into craft training programs to determine whether they operate to discriminate against blacks.

1. Representation of Blacks in Craft Jobs and Training Programs.

The company defines craft jobs as those in job classes 9 through 13. As to the representation of blacks in craft positions at the time of trial the district court found:

> Black employees fill 10 (5%) of approximately 200 craft jobs at Stockham. Five percent is not an underrepresentation of blacks in craft jobs compared to the local and national labor markets.

394 F.Supp. at 455. The court's conclusion that a five percent representation of blacks in craft jobs is not disproportionate because it compares favorably with local and national labor markets is clearly erroneous. The relevant work force for comparison purposes is Stockham where 66 percent of all maintenance and production workers are black.[48] When compared with that figure, 5 percent looks paltry indeed. In fact, statistical evidence shows that in June 1973, while only 6 blacks were working in craft jobs at Stockham, 227 whites were employed as craftsmen. Further, in June 1965 there were 70 white craftsmen and no blacks; similarly in June 1968 there were no black craftsmen and 85 whites in craft jobs.

In addition, the court cited as evidence that Stockham does not discriminate against blacks with regard to craft positions the fact that no black employee who has completed the apprentice program at Stockham or elsewhere is not employed in a craft position. *See* 394 F.Supp. at 455.

[48] See the text and note at footnote 49.

This finding fails to prove a lack of discrimination because it ignores three facts: (a) the testimony of company officials that a substantial number of craftsmen at Stockham have been trained in the company's apprenticeship program;[49] (b) that no black was admitted to the apprenticeship training program until April 1971; and (c) that only 6 of 101 employees selected by the company for apprenticeship training since July 2, 1965, have been black.

The district court however found that the apprentice program has never been restricted to whites. 394 F.Supp. at 475. As evidence for this conclusion the court cited the following statistics:

> From 1965 through 1973, a total of 65 timely applications for apprentice positions were filed, 14 by black and 51 by white employees. Of that total 38 were granted, 6 for black and 32 for white employees.

394 F.Supp. at 477. These statistics do not serve factually or legally to counter the inference of discrimination raised by the plaintiffs' statistics on black participation in the apprenticeship program. The filing of a timely application has never been a requirement for admission to the apprenticeship program. Of 101 employees admitted to the program since 1965, 63 did not file timely applications. More significantly, every employee who entered the program without filing a timely application was white. Thus, the court's citation of statistics to show that a comparable number of timely applications to the apprenticeship program were granted for black and white employees is largely irrelevant. Further, no black filed an application for the program until 1971. Such applications were apparently

[49] Since 1965 the company has trained 101 apprentices while from 70 to 233 individuals have worked as craftsmen. In addition, Flount R. Hammock, the manager of the Alabama State Employment Service in Birmingham, testified that there were few black or white skilled craftsmen in the area.

seen by black employees as "useless acts", *Teamsters*, —— U.S. at ——, 97 S.Ct. 1843, because of the total exclusion of blacks from the program until 1971. Thus, the court's reliance on the number of timely applications filed and granted by race to prove a lack of discrimination in apprentice training was erroneous. As we asked in another case, "[i]f an employee realizes full well that blacks simply are not hired [for certain positions], why should he bother to apply?" *Bing v. Roadway Express, Inc.*, 485 F.2d at 451. Just recently the Supreme Court recognized, as no new principle, that unlawful employment practices may be so successful as to totally deter victims of gross and pervasive discrimination from applying for jobs. *Teamsters*, —— U.S. at ——, 97 S.Ct. 1843.

We conclude that the district court was clearly erroneous in finding that Stockham has never had a policy of excluding blacks from craft jobs and the apprenticeship program.[50] The next question is whether the procedures

[50] Testimony from individual black employees at Stockham who sought admission to the apprenticeship program before 1971 reinforces this conclusion. For example, Frances E. Smith, Jr., a black apprentice testified to the following sequence of events:

> Q [Plaintiffs' attorney] Mr. Smith, while at Stockham, have you applied for other jobs?
> A [Smith] Yes, sir. I applied for a machinist apprentice class in 1969.
> Q What was the disposition of that?
> A Well, he sent me to take the test.
> Q Did you take a test?
> A I took a test.
> Q Do you recall what test that was?
> A Well, I don't know what it was. It was some of the little simple tests about machinery, gears, and about if you have two rooms of furniture, one has got a carpet in it and the other one is empty, which one has the loudest echo. It was simple.
> Q Did you get the results from the test?
> A Well, I had a time getting the results. At first I couldn't

established by Stockham for screening and selecting apprentices served to accentuate and to perpetuate the effects of such discrimination.

2. Testing Requirements

Since 1953 applicants for apprentice training have been required to achieve a passing score on the Bennett Mechanical Test. The district court found that the Bennett test did not have an adverse impact on blacks because beginning in 1969 or 1970 the company did not require black employees to attain the same scores on the test as whites. See 394 F.Supp. at 483. That finding is clearly erroneous. Edward

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get any results, and I kept after my foreman. He finally told me that I flunked the test.

Q What year was this?
A In 1969.

Q Did you take any other tests?
A No, sir.

Q But it says that you were admitted in the apprentice program in 1971?
A In April of 1971 he come back to me and brought me a slip where I took the test in 1969 saying that I passed.

Q All right.
A Okay. Well, he told me I passed. I asked him, I said, "Why did you tell me I flunked?" The foreman said he don't know anything about this.

Q Okay. And when did you first apply for the apprentice program?
A In 1969. I had been inquiring about it before then, but I couldn't get any information.

Also, according to the evidence, a named plaintiff, Louis Winston, spent nearly seven years as a laborer in the electrical shop. He was given excellent employee evaluations and from the outset of his employment was considered eager to learn and one of the best employees in that job. He was the second black admitted to the apprenticeship program in 1971 even though prior to that time many whites were brought into the electrical shop with less seniority to assume jobs in higher classifications and to receive apprentice training.

Glenn, the Stockham manager in charge of administering and grading that test in 1969 and 1970, testified without qualification that the examinations completed by black and white employees were graded the same way and the results were treated equally. He denied that a dual scoring system had been employed. That no blacks were admitted to the apprenticeship program before 1971 raises a prima facie case of discrimination. *Watkins v. Scott Paper Co.*, 530 F.2d at 1185-86. The defendant Stockham failed to present evidence of the job-relatedness of the test. Therefore, the use of the Bennett test for selection of apprentices was unlawful.

The Wonderlic Personnel Test was used for screening employees seeking admission to the apprenticeship program from August 1965 until March 1971. Stockham required a score of 18 on that test. In subsection "III.B" of this opinion we discussed the lawfulness of the Wonderlic testing program and concluded that the plaintiffs made a prima facie case of the adverse impact of the test on blacks seeking jobs, including apprenticeship training, for which higher scores were required. As we stated, because the defendant offered no evidence of job-relatedness, we have concluded that the plaintiffs are entitled to equitable relief from the effects of the Wonderlic testing program.

3. Educational Requirements

In 1970 Stockham instituted a requirement that all apprentices have a high school diploma or its equivalent. Before 1970 only a grammar school education was required. Under Title VII, practices and procedures "cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices". *Griggs v. Duke Power Co.*, 401 U.S. at 430, 91 S.Ct. at 853. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431, 91 S.Ct. at 853. The plain-

tiffs contend that the high school education requirement is a "neutral" employment practice that operates to perpetuate the effects of past discrimination because it has an adverse impact on black employees and has not been shown to be job-related. The district court reached a contrary conclusion, finding:

> There has been no showing on the part of plaintiffs that the education and age guidelines produce a disproportionate impact on black applicants, . . . as there is no significant difference between the percentage of black and white employees at Stockham possessing high school educations. Until a showing of disproportionate impact is made, Stockham is not required to demonstrate that the education and age requirements are job related. (Footnotes omitted.)

394 F.Supp. at 497. The evidence shows that 61.5 percent of the white hourly workers have a high school education; whereas, only 50.1 percent of the black hourly workers meet that requirement. Because 66 percent of the production and maintenance workers are black, these percentages mean that 280 white employees as compared with 772 blacks are disqualified from the apprenticeship program by this requirement. Further, while 58 white workers have been selected for apprenticeship training since the requirement was imposed in 1970, only 6 black employees have been chosen. Apparently as a second reason for finding there was no adverse impact on blacks from the operation of the education requirement, the district court found that the requirement is not automatically applied, citing the following statistics:

> Since 1965 the high school education level requirement for the apprentice program has been waived on 4 occasions, 3 times for white employees and once for a black employee.

394 F.Supp. at 477. The statistics cited by the court fall of their own weight. While fewer blacks have a high school

diploma than whites, the requirement has been waived for only four employees out of 64; three of these were white.

The evidence that fewer blacks than whites proportionately have attained a high school education and that only 9 percent of the employees chosen for the program during the operation of the educational requirement have been black when two-thirds of the work force is black compels us to conclude that the high school requirement is discriminatory in its effect. Therefore, Stockham had the burden of showing that the requirement has "a manifest relationship" to the apprenticeship program. *Griggs v. Duke Power Co., supra,* 401 U.S. at 432, 91 S.Ct. at 854. The defendant offered no evidence to satisfy this burden.

4. Age Requirement

In 1970, at the same time that Stockham imposed the high school education requirement for selection to the apprenticeship program, the company added a maximum are limit for apprenticeship training of thirty, excluding time in military service. The plaintiffs cite this as another requirement that serves to "freeze in" the effects of past discrimination. As we cited in the preceding section of this opinion, the district court found that the requirement had no disproportionate effect on black employees. 394 F.Supp. at 497. We do not agree.

Because of the company's policy of excluding blacks from the apprenticeship program in the past, the age requirement operates to prevent all blacks who reached the age of thirty before 1971, the first year any blacks were admitted into the program, from having an opportunity for apprenticeship training. In comparison, no white has been excluded by the age requirement who was not subject to consideration for the program before he became thirty years of age.

The age requirement thus operates as a practice neutral on its face but perpetuating the effects of past discrimination. For such a practice to be lawful under Title VII, it must be related to job performance or the employer must show that the requirement is a business necessity. As we observed in *Local 189, United Papermakers and Paperworkers v. United States*, 5 Cir. 1969, 416 F.2d 980, 989:

> When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overiding legitimate, nonracial business purpose.

The company contends that the age limit is necessary to protect its investment in the lengthy apprenticeship training program. This justification, without more, cannot meet the burden imposed by the doctrine. The business necessity of a practice is not shown merely with evidence that it serves "legitimate management functions".

> "Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. . . . If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued." *United States v. Bethlehem Steel Corp.*, 2d Cir. 1971, 446 F.2d 652, 662 [1971].

United States v. Jacksonville Terminal Co., 451 F.2d at 451. The thirty-year maximum age limit has not been shown to be essential to the goals of safety and efficiency. Any lesser showing is insufficient. There is nothing particularly compelling about the company's decision to protect its training investment when the employee is thirty. The unfairness becomes apparent when it is considered in view

of Stockham's imposition of the age requirement on apprenticeship applicants in 1970, before beginning to admit blacks to the program and when no whites had ever been excluded on the basis of age. *See* EEOC Guideline 29 C.F.R. § 1607.11 (1974) and footnote 43. The plaintiffs are entitled to equitable relief from the continued application of this requirement.[51]

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[51] The defendant Stockham contends that under *Washington v. Davis*, 1976, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597, and *Gilbert v. General Electric Co.*, 1976, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343, "it is no longer enough to demonstrate only that employment practices have a disproportionate adverse effect on black employees in the absence of facts reflecting an employer's intention so to discriminate." Neither case requires that conclusion. Quite the contrary is true. In *Washington* the issue was whether a personnel test excluding a disproportionately high number of blacks violated the plaintiff black employees' rights under the due process clause of the Fifth Amendment. The Supreme Court specifically distinguished the "more rigorous" Title VII standards from those constitutionally applicable to the case, in finding the test not violative of the Fifth Amendment. As the Court explained:

> Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways. . . . We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and Fourteenth Amendments in cases such as this.

Id., 426 U.S. at 246, 96 S.Ct. at 2051, 48 L.Ed.2d at 611-12. In *Gilbert* the Court concluded that the plaintiffs failed to show that the exclusion of one physical condition, pregnancy-related disabilities, along with others from a health insurance plan had a gender-based discriminatory effect, given the fact that fiscal and actuarial benefits of the program accrue to members of both sexes for the risks included in the plan's coverage. As for the high school and age requirements used at Stockham for screening applicants for apprenticeship training, the adverse impact on black employees has been shown by the plaintiffs' evidence.

5. Supervisory Discretion

The plaintiffs and the EEOC contend that the disproportionately small number of blacks selected for the apprenticeship program since 1971 is also caused by subjective, discretionary selection procedures. The evidence shows several critical facts. The foreman or superintendent of the department in which a craft vacancy occurs selects a candidate for the apprenticeship program; that recommendation is almost invariably followed by the apprenticeship committee, which makes the final selection. Supervisors in other departments may also recommend employees. There are no formal written guidelines for the selection decision. Only such general factors as "desire" and "aptitude" for the craft position are considered. Just five of 120 foremen and none of the 26 superintendents or six general foremen are black. Thus, the plaintiffs are complaining of a largely subjective selection process involving white supervisors.[52] This procedure presents a "ready mechanism" for discrimination. *Rowe v. General Motors Corp.*, 457 F.2d at 359. Such subjective procedures when combined with statistical evidence on the grossly disproportionate number of blacks selected for the apprenticeship program since 1971;[53] the unvalidated testing, educational, and age requirements that adversely affect blacks and the continuation of segregated facilities and programs until 1974, make a conclusive showing of present discriminatory practices. In *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 239, this Court reached a similar determination:

> The historical formal exclusion and the statistical and testimonial evidence demonstrating disproportionate exclusion of blacks by the testing and educational requirements, when combined with the continuing use of the high school education or its equivalent standard and lengthy apprenticeship term, constitutes not merely a *prima facie* case, but *conclusive* proof of present effect from past discrimination. (Footnotes omitted.)

[52] *See* footnote 26.

[53] Nine percent of those selected for the apprenticeship program between 1971 and 1973 were black as compared with a production and maintenance workforce that is two-thirds black.

See also United States v. Jacksonville Terminal Co., 451 F.2d at 442. We think that conclusion is equally applicable here.

E. *Selection of Supervisors*

The plaintiffs and the EEOC contend that the district court's conclusion that the company did not discriminate in the selection of supervisors is clearly erroneous. In support of this contention they point to (1) the statistical evidence of a gross disparity between the number of blacks working in supervisory positions at Stockham and the number of black production and maintenance employees, and (2) the subjective selection procedures.

The evidence shows that there were no black supervisors at Stockham until May 1971. In 1973 of 120 foremen only 5 were black. There were no blacks of 26 superintendents and 6 general foremen. A majority of supervisors are selected from hourly employees of whom two-thirds are black. Some are chosen directly from the hourly work force and others are selected from the company's personnel development program ("PDP"), which trains employees for supervisory positions.

According to Jack Marsh, the production manager at Stockham, the principal criterion for selecting an hourly employee as a supervisor is the "best man" for the job. He stated that such other qualifications as desire to be a foreman, work record, knowledge of the job, training, physical fitness, and common sense are also considered.

There are no formal, written guidelines for the selection process. The superintendent of a department having a vacancy in the supervisory staff selects candidates for the job and consults with the production manager in making the decision. The supervisors and the production manager are all white. As for the PDP, final selection of participants is made by incumbent foremen and superintendents. There are no formal, written guidelines for the selection procedure.

In *Rowe v. General Motors Corp.*, 457 F.2d at 358-59, this Court concluded that an employer's promotion and transfer procedures violated Title VII. We held that five aspects of the selection process, when taken together, had a discriminatory effect on black employees: (a) the foremen's recommendation was the single most important factor in the promotion process; (b) foremen were given no written instructions pertaining to the qualifications necessary for promotion; (c) controlling standards were vague and subjective; (d) hourly employees were not notified of promotion opportunities or of the qualifications necessary to get jobs; and (e) there were no safeguards in the procedure designed to avert discriminatory practices.

Stockham's system for selecting supervisors is basically the same as the system condemned in *Rowe*. First, incumbent foremen and superintendents play a critical role in the selection of new members of the supervisory staff and PDP participants. This role is even greater than the one criticized in *Watkins* where we also applied the five *Rowe* factors. *See Watkins v. Scott Paper Co.*, 530 F.2d at 1193. Second, the recommendations of incumbent supervisors are largely discretionary and there are no adequate safeguards against racial bias. Third, there are not written guidelines specifying the necessary qualifications of a supervisor for either the direct selection process or the PDP. Fourth, as found in *Watkins*, some of Stockham's criteria for promotion can be described only as subjective. Certainly the primary one, "best man", has no objective elements. Fifth, there is no systematic procedure at Stockham for informing employees of supervisory vacancies. There has never been a system of job posting for any kind of vacancies at Stockham despite union demands that the procedure be implemented. The district court apparently considered the timely application procedure an adequate alternative. We do not. First, the "useless act" or "meaningless request" phenomenon discussed above [54] impedes the procedure's effectiveness. *See Teamsters*, —— U.S. at ——, 97 S.Ct. 1843; *Bing v. Roadway Express, Inc.*, 485 F.2d at 451. Moreover, of 75 employees selected as foremen since 1965, only two filed timely applications. The company itself does not take the procedure seriously.

The district court excused the grossly disproportionate number of black supervisors on the notion that there has been a low turnover in such positions since 1965. 394 F. Supp. at 478, 496. On the contrary, the evidence shows that over 63 percent of the present foremen were selected after 1965. We have concluded that Stockham's supervisory selection procedure is discriminatory, in part, because of the grossly disproportionate number of black supervisors and the similarities between the discretionary, subjective selection procedure at Stockham and the system condemned in *Rowe*. The district court's contrary findings are clearly erroneous.

The plaintiffs also challenge the process by which participants in the management training program ("MTP"), and its predecessor organizational apprentice program ("OAP"), are selected. These programs were designed to train college graduates in technical fields for upper level management positions. The defendant recruits participants from largely all-white universities such as Auburn University, the University of Alabama, the University of Tennes-

[54] *See* subsections "III.B." and "III.D.1."

see, Georgia Institute of Technology and Samford University. Stockham has never recruited at the six or more predominantly black institutions in the area. No black has ever been selected for this program although fifty whites have been chosen since 1969.

In *United States v. Georgia Power Co.*, 5 Cir. 1973, 474 F.2d 906 at 926, this Court condemned the concentration of a company's recruitment activities at white educational institutions:

> The company's policy of seeking skilled personnel only at white educational institutions is similarly an invidious brake on black employment opportunities for which no business necessity justification was shown. While the company obviously ought not be enjoined to recruit on all college campuses unless it chooses to do so, it also ought not be allowed to continue to restrict its recruitment programs to all—or preponderantly all—white institutions while maintaining such a racially imbalanced work force.

We have reached the same conclusions here in deciding that Stockham's recruitment system for the MTP and its predecessor, the OAP, operates as a "built-in-headwind" against blacks. *Id.* at 925.

F. *Seniority System*

The plaintiffs and the EEOC contend that Stockham's departmental seniority system, when combined with the company's discriminatory job assignment practices, unlawfully reinforces and perpetuates prior discrimination. According to the EEOC, the seniority system operates to "freeze in" the effects of discriminatory job assignments in two ways:

> (1) by conditioning transfer on the sacrifice of seniority, it inevitably inhibits black employees from seeking to escape to departments to which they were assigned because of race, and
>
> (2) by refusing to recognize after transfer seniority acquired in black departments, or departments with particular jobs open to blacks, it continues to penalize them for their initial, racially-based assignments.

We discussed Stockham's job assignment practices in subsection "III.B." of this opinion and concluded that the company has unlawfully allocated jobs on the basis of race both before and after the effective date of Title VII, at least until 1973. The issue here is whether Stockham's departmental seniority system, which is neutral on its face, is unlawful because it accentuates the effects of Stockham's discriminatory job assignment practices.

The seniority system at Stockham has been modified twice since 1970. Until June 10, 1970, an employee who voluntarily transferred to a new department lost all of his accumulated seniority at the time of the transfer. He was treated for promotion and regression purposes as a new employee. With the 1970 modification to the system, an employee transferring to a new department was given eighteen months from the date of the transfer to decide whether he wanted to return to his old department. If he decided to return, the employee was permitted to re-enter his old department with his accumulated seniority within twenty-four months of his transfer. If he stayed in the new department, the employee lost the seniority he had accumulated in his old department. In 1973 the collective bargaining agreement effected a further modification of the seniority system at Stockham. If after eighteen months an employee elected to remain in the department to which he transferred, he was permitted to retain his seniority in the old department for layoff purposes, but only until he had been in the new department as long as he had been in the old department. If during that period the employee was

laid-off from the new department, he was allowed to return to his old department with his accumulated seniority. Even after the 1970 and 1973 modifications to the seniority system several features remained unchanged: (1) at some point after an employee transfers to a new department, he forfeits his accumulated seniority; (2) an employee who transfers between departments is a new employee for all promotion and regression purposes in his new department; and (3) a departmental employee has the first opportunity to promote to all vacancies within his department.

Seniority systems such as the one at Stockham consistently have been condemned by the courts because black employees must choose to commit "seniority suicide" to enter departments from which they were previously excluded unlawfully on account of race. In addition, the plaintiffs argue, the Stockham system also "locks" such employees into their old departments by not providing for pay rate retention, thereby forcing transferring employees to take a short-term pay cut to receive potentially greater earnings in the future.

According to the district court, "the record does not support the conclusion that Stockham's departmental seniority system locks black employees into particular jobs, pay categories or departments." 394 F.Supp. at 454. The court's determination was based on two sets of findings. On the issue of the comparative desirability of predominantly black and predominantly white departments, the court found:

> The relatively high earning opportunities in the foundries (malleable, brass, and grey iron) suggest that the high number of blacks in these departments results from voluntary choices by these employees to work in those departments where the most money can be made. . . .

> . . . The evidence introduced by plaintiffs failed to establish that there are demonstrably superior working conditions in certain departments, and this Court finds that the working conditions in various departments at Stockham are generally the same.

394 F.Supp. at 453-54. As to the number of interdepartmental transfers made by black and white employees the court found:

> At all relevant times black employees have accounted for the large majority of all inter-departmental transfers. Black employees accounted for a low of 59.4% in 1965 and a high of 89.7% in 1968 of all inter-departmental transfers.

394 F.Supp. at 452.

The district court's conclusion that blacks have no incentive to transfer at Stockham because the departments to which they have been assigned are no less desirable than those with predominantly white employees is clearly erroneous. We have already discussed [55] the evidence on the working conditions of predominantly black and white departments. The record shows that black employees at Stockham tend to work in the hottest, dustiest, and dirtiest departments. In addition, the vast majority of blacks work in lower classified jobs under the company's incentive system. Even if some black employees earn as much as whites working in higher job classes, the evidence shows they do so only under the great pressure of the "racetrack" while performing numbingly repetitive tasks. Further, the evidence does not establish that the earnings opportunities are the same in these departments. Thirty-three percent or 174 of all whites work in the seven de-

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[55] *See* subsection "III.B." and the text and note at footnotes 21 and 23.

partments with the highest earnings opportunities while only 4 percent of the blacks are employed in those departments. And, 70 percent or 836 of all black employees work in the seven departments with the lowest earnings opportunities; whereas, 23 percent of all white workers are employed in those departments. Therefore, the district court's first set of findings does not support its conclusion that blacks remain in the departments to which they are assigned because they have no incentive to leave.

The statistics cited by the court on the percentage of interdepartmental transfers by black employees do not include the actual number of interdepartmental transfers. It is impossible, therefore, to judge the magnitude of the transfers at Stockham. Because some blacks are willing to transfer to new departments even though they will lose seniority and suffer a cut in pay as a result does not mean that many more blacks are deterred from transferring because of these disadvantages. In addition, we would expect a larger percentage of blacks than whites to transfer where, as in this case, whites already work in jobs with better earnings potential, less pressure, and more satisfactory working conditions; and the statistics cited by the district court support this thesis. Finally, the figures cited by the district court are not accompanied by information on the seniority of transferring blacks. The more junior the employee, the less inhibition to transfer there is from the system. The evidence cited by the district court, therefore, does not support its conclusion that the seniority system at Stockham does not "lock" blacks into jobs discriminatorily assigned to them.

The district court's conclusion that the seniority system at Stockham had no "locking-in effect" because there was no incentive for black employees to transfer to new departments and because a higher percentage of blacks than whites changed departments after 1965 is clearly

erroneous. In *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 223-224, this Court evaluated a departmental seniority system. In that case a transferring employee retained his former seniority for purposes of returning to his old department in case of lay-off from his new department, but did not carry over any of his accumulated seniority for purposes of departmental promotion. Under that system an employee who transferred to a new department to enhance his chances for eventual advancement, higher pay, or better working conditions was required to endure a loss of seniority and a wage cut as a condition of transfer. We concluded in *Pettway* that the present effect of such a system was to lock black employees into jobs and departments to which they had originally been assigned on account of race. In so doing this Court rejected the district court's eight reasons for finding that blacks were not being "locked-in". Those reasons included voluntary refusal of blacks to accept training and promotion opportunities, their failure to request promotions, poor job performances by black employees, lack of job vacancies, and the lack of motivation on the part of blacks at the company. This Court determined that critical examination of those variables led to the conclusion that they did not weigh heavily enough to overcome the plaintiffs' empirical evidence of racial stratification in departments, jobs, and pay rates.

Here too we reject the reasons given by the district court for finding no locking-in effect. The continued stratification of blacks in the least desirable departments and jobs, in terms of working conditions and earnings potential, is clear from the plaintiffs' statistics.[56] "Once it has been determined that blacks have been discriminatorily assigned to a particular department within a plant, departmental seniority cannot be utilized to freeze those

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[56] *See* subsection "III.B."

black employees into a discriminatory caste." (Footnote omitted.) *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1373. Under the seniority system in effect at Stockham before 1970 blacks who transferred between departments lost all accumulated seniority for promotion and regression purposes. Blacks transferring to new departments after 1970 have been required to start as new employees for job promotion and regression in the new department. After a period of time in the new department a new employee is forced to forfeit all his accumulated seniority even for layoff back to his former department.

In *United States v. Jacksonville Terminal Co.*, 451 F.2d at 453, we dealt with a craft and class seniority system in which an employee who gained a position in a new craft or class could not retain his accumulated seniority in his former craft or class. In finding the system unlawful we commented: "In any industry loss of seniority is a critical inhibition to transfer." That statement applies here too. Further, from 1965 to 1971 the company required a lower score on the Wonderlic test for an employee transferring to a job within his department than for an employee transferring from another department. This procedure operated more decisively to freeze in past discrimination than the three-day preferential bidding period for departmental employees condemned in *Pettway. See Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 240. Finally, Stockham's seniority system does not provide for rate retention for an employee who transfers to a lower paying job in a new department as a first step to reaping long range job and earnings rewards. These factors compel us to conclude that the departmental seniority system at Stockham, even as modified in 1970 and 1973, locks-in the effects of pre-and post-Act discriminatory employment practices at Stockham. *See Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1373-74 and cases cited at 1373 n.27; *United States v. Georgia Power Co.*, 5 Cir. 1973,

474 F.2d 906, 926-27; *United States v. Jacksonville Terminal Co.*, 451 F.2d at 452-453.

The defendant Stockham contends that even if the seniority system operates to lock-in the effects of past discrimination, the system is justified by business necessity. Although this contention is not detailed in the defendant's brief, its essentials seem to be that the seniority system is a necessary element of the "unique multi-plant complex" operated by Stockham in Birmingham. A company official testified that the six "plants" are composed of the following seniority units: cast iron fittings, malleable fittings, bronze valve, iron valve, steel valve, and butterfly valve. He asserted that interdepartmental, or "cross-plant", transfers will create substantial difficulties for Stockham.

The business necessity defense, as the defendant applies it here, has no substance. First, at least four of the twenty-two seniority departments at Stockham extend over more than one "plant". The valve machining and assembly department extends over several of the six "plants" and the electrical, machine shop, and construction departments extend over all of the "plants". Thus, the functional separation of the company's manufacturing operations does not reach the proportions suggested by Stockham's contention that it effectively operates six different plants at its Birmingham facility. Second, Stockham's statement that it has not discouraged interdepartmental transfers is inconsistent with its assertion that there are difficulties associated with so-called "cross-plant" transfers.

To be justifiable under the business necessity doctrine a seniority system must be essential to the goals of safety and efficiency. *United States v. Bethlehem Steel Corp.*, 446 F.2d at 662; *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 245. The defendant has failed to satisfy that heavy burden. There has been no showing that departmental seniority is essential to safety and efficiency at Stockham.

In its recent opinion in *Teamsters,* —— U.S. at ——, 97 S.Ct. 1843, the Supreme Court stated that a seniority system, not justified by business necessity, that operates to freeze the status quo of prior discriminatory employment practices would seem to be unlawful under the rationale of *Griggs v. Duke Power Co.* Nevertheless, the Court concluded that such a system is legally valid under section 703 (h) of Title VII, 42 U.S.C. § 2000e-2(h), if it is a bona fide seniority system within the meaning of that section.[57] In reaching this result the Court refused to distinguish between seniority systems that perpetuate pre-and post-Act discrimination. *Id.* at —— n.30, 97 S.Ct. 1843. As to relief, however, the Court differentiated between pre-and post-Act discriminatory acts, pointing to the holding in *Franks v. Bowman Transportation Co.,* 1976, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444, that:

> § 703(h) does not bar the award of retroactive seniority to job applicants who seek relief from an employer's post-Act hiring discrimination.

Id. at ——, 97 S.Ct. at 1860. Thus, according to the Court,

> [p]ost-Act discriminatees . . . may obtain full "make whole" relief, including retroactive seniority under *Franks v. Bowman, supra,* without attacking the legality of the seniority system as applied to them.

Id. at ——, 97 S.Ct. at 1860. See EEOC; Interpretative Memorandum, 7/12/77, 46 L.W. 2028.

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[57] Section 703(h), 42 U.S.C. § 2000e-2(h), provides in part:

> Notwithstanding any other provision of this subchapter, it shall be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race. . . .

In this case the plaintiffs have proved that Stockham engaged in post-Act discriminatory employment practices in job allocation, testing, craft training and selection, and promotion. Any black injured by these practices is entitled to relief, including retroactive seniority. The issue whether the seniority system at Stockham is bona fide under section 703(h) of Title VII is relevant to this case only if the district court concludes that the class of black employees represented by the plaintiffs consists of some blacks who suffered only from pre-Act discrimination. The following comments are intended to guide the district court's analysis of that issue.

In *Teamsters* the Court focused on whether a seniority system, contained in collective bargaining agreements between the employer, a nationwide common carrier of motor freight, and the unions was bona fide. Under that system an employee's seniority for competitive purposes was his bargaining unit seniority, which controlled the order in which he was laid-off or recalled and the order in which he could bid for a particular job. Line drivers were in one bargaining unit and city drivers and servicemen were in another. The practical effect of the seniority arrangement was that a city driver or serviceman who transferred to a line-driver job forfeited all the competitive seniority he had accumulated in his previous bargaining unit and started at the bottom of the line-driver's roster. The Court found that the system locked-in the effects of the employer's past intentional discrimination; nevertheless, the system was bona fide. The Court explained:

> [The seniority system] applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line

> drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with NLRB precedents. It is conceded that the seniority system does not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful. (Footnote omitted.)

International Brotherhood of Teamsters v. United States, ——U.S. at ——, 97 S.Ct. at 1865.

As we read the *Teamsters* opinion, the issue whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system is or is not bona fide. *See also United Air Lines, Inc. v. Evans*, —— U.S. ——, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). The Court's analysis suggests that the totality of the circumstances in the development and maintenance of the system is relevant to examining that issue. *See also Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d at 608-09. In *Teamsters* the Court focused on four factors:

1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;

2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

3) whether the seniority system had its genesis in racial discrimination; and

4) whether the system was negotiated and has been maintained free from any illegal purpose.

The Court analyzed the context in which the seniority system developed. In discussing the relationship of seniority units to bargaining units, the Court quoted a National Labor Relations Board opinion that emphasized the rationality of separate bargaining units in the case of over-the-road and city drivers "where they are shown to be clearly defined, homogeneous, and functionally distinct groups with separate interests". *Id.*, —— U.S. at ——, n.42, 97 S.Ct. at 1865. Thus, the facts of a particular seniority unit are critical to a determination whether the system is bona fide; and a case-by-case analysis of seniority systems in light of section 703(h) is necessary.

In *Teamsters* the plaintiffs conceded that the seniority system did not have its genesis in racial discrimination and that it was negotiated and maintained free from any illegal purpose. There is no such concession here. The seniority system at Stockham was adopted in a collective bargaining agreement in 1949, when segregation in the South was standing operating procedure. The history of the negotiations associated with Stockham's seniority system is clouded. Since 1967 the local union has sought major revisions in the departmental seniority system through contract negotiations with the defendant Stockham.[58] In 1970 the union

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[58] E. Reeves Sims, the company's manager of employee and public relations, gave the following testimony on the 1970 negotiations:

> Q Isn't it a fact that the Union wanted and has tried to get job posting and job bidding at the plant, Mr. Sims?
> A They have proposed that, yes, sir.
> Q Isn't that—that would take the place of this timely application procedure?
> A Yes.
> Q Now, a job posting, isn't it true that the Union has sought posting throughout the plants so all employees would know what jobs are open; isn't that correct?
> A That's correct.
> Q And what's the Company position? Why do you or have you and the Company opposed this job posting?

struck for five months seeking the company's agreement with its proposals, including plant-wide seniority. Stockham's failure to go along with revisions in the seniority

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A We've never agreed on it because we felt that timely application was the best.

Q Wouldn't job posting provide better information to all of the employees?

A We've never agreed on that.

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Q All right. Now, job bidding and job posting, you've never agreed on. The Union has continually sought to get that, have they not?

A They have proposed it, yes, sir.

Q I think that was part of the package that was on the table in 1970 when you had a five months strike, was it not, Mr. Sims?

A As I remember it, it was in the proposal, yes, sir.

Q Now, the Union in 1970 in one of its proposals was seeking plantwide seniority. If I understand it correctly, the Company opposed that, is that correct?

A We didn't agree on it, yes, sir.

In addition, Edward D. Coleman, Stockham's superintendent of quality assurance and a participant in the 1970 negotiations stated: "All of the discussions we had with the union were in issue during this [1970] strike."

Finally, the president of the Local, Joseph E. Robbins, confirmed that the subject of plant-wide seniority was included in the 1973 contract negotiations:

Q In the '73 contract negotiations in the meetings that—and you attended them, I assume—do you recall the mention of a Bethlehem Steel Decision at Lackawanna, New York?

A The name doesn't—I know what it pertains to, I mean what it—

Q All right. What—

A What it's all about.

Q All right, sir. In what context was that raised, if you remember?

A By the Union prior to going into our written statements on the table.

Q All right, sir.

system must be evaluated in the context of the company's extensive unlawful employment practices during the period of the negotiations and its intransigent adherence to wide-spread segregated facilities at the plant, at least until 1974. In addition, Stockham's resistance to revisions in the seniority system must be considered in light of the union's firm support for such changes and its willingness to strike for the proposed modifications in 1970. Finally, unlike the facts of *Teamsters*, here the seniority units do not reflect existing separate and distinct bargaining units that conform to industry practice. The district court should give careful consideration to the negotiations involving the seniority system at Stockham and to the employment practices of the company underlying such negotiations. Because the issue whether the seniority system is bona fide was not legally relevant when this case was tried, on remand the district court should allow the parties to present additional evidence on the question.

IV.

Union Liability

As to the defendant unions, Local 3036 and the United States Steelworkers of America, AFL-CIO, the district court concluded:

A We had discussed plant-wide seniority.

Q And is it in that context that a reference was made to some lawsuit?

A Yes.

Q Now, when you say prior to you written proposals do you orally go through some particular sections of the contract or some—pick out some items and talk about these orally before you go into your written proposals section by section?

A Yes.

Q And it was this occasion that you had an oral discussion of plant-wide seniority?

A Right.

Q In 1973?

A '73.

> Since this Court finds that there has been no violation of the Act, there is of course no liability on the part of the defendant unions. However, in the interest of judicial economy, this Court concludes that if liability existed, and since the contract between Stockham and the unions is the product of negotiation, the defendant unions would also be liable in their roles as bargaining agent in the collective bargaining process. . . .

394 F.Supp. at 499. We remand the question of the unions' liability to the district court. The court clearly erred in finding no liability for any defendant under Title VII. Thus, the determination that the unions are not liable because the employer is not liable cannot stand. The alternative finding that the unions violated Title VII if the employer did also must fall. The Supreme Court's decision in *Teamsters* may require a determination whether the seniority system at Stockham is bona fide. If the system is found to be protected under section 703(h) or if the court does not reach that question, the unions could not have violated Title VII in agreeing to and maintaining the system. *Teamsters*, —— U.S. at ——, 97 S.Ct. 1843. If, on the other hand, the district court concludes that the seniority system is not bona fide, it must consider the question whether the unions' role in ratifying collective bargaining agreements containing the various seniority provisions compels a finding of liability.

The plaintiffs in this case assert that the findings of the district court on the unions' role in negotiating the seniority system are not supported by the evidence. The court found:

> While other forms of seniority may have been discussed from time to time, the basic (i. e., written) bargaining proposals submitted to Stockham by the Unions have never requested a change from the existing departmental seniority system and have instead reflected an intention on the part of the unions to preserve the present seniority system.

394 F.Supp. at 451. The plaintiffs contend that the record reveals that from 1967 to 1973 the unions sought major revisions in the departmental seniority system through negotiations.[59] Union segregation is not an issue in this case, as it was recently in *Myers v. Gilman Paper Corp.*, 5 Cir. 1977, 544 F.2d 837. Since World War II a majority of the local union's members have been black, and a majority of the members of the grievance committee and the officers have been black since 1967. On remand, the district court should evaluate these facts in light of *Teamsters* and *Evans* in determining whether the unions must bear legal responsibility in the event the seniority system is not bona fide.

V.

Relief.

Congress has granted courts plenary equitable powers under Title VII, 42 U.S.C.A. § 2000e-5(g), and section 1981 for constructing appropriate remedies for employment discrimination. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 243. In *Jacksonville Terminal* we emphasized that the responsibility for fashioning effective relief lies with the district court:

> Under the District Court's careful supervision, the parties should work together in developing effective antidotes for the racial discrimination which we perceive . . . . The District Court bears the ultimate responsibility for fashioning such relief; it is not limited to simply parroting the Act's prohibitions but is required to order such affirmative action as may be appropriate.

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[59] *See* text and note at footnote 58.

United States v. Jacksonville Terminal Co., 451 F.2d at 458. *See also Gamble v. Birmingham Southern R. R.*, 5 Cir. 1975, 514 F.2d 678, 685-686.

A. *Injunctive and Declaratory Relief.*

On remand the district court should grant the plaintiffs injunctive relief against present discriminatory policies and practices at Stockham. During the proceedings below the trial judge denied an injunction against the continued segregation of facilities at the Stockham plant because he concluded the issue was "effectively resolved" by the conciliation agreement between the EEOC and Stockham. The district court's finding that the women's restrooms in the dispensary are not segregated is clearly erroneous, and an injunction must be entered against the continued segregation of the two restrooms.

The plaintiffs and the amicus EEOC contend that on the facts of this case broader injunctive relief is appropriate on the issue of segregated facilities. They argue that the psychological harm engendered by the involuntary separation of black and white people entitles the black employees at Stockham to the assurance of integration, which the injunction will provide. Further, the EEOC contends that the company's continued segregation of facilities in the ten years following the enactment of the Civil Rights Act of 1964 suggests that Stockham did not make a good faith effort to comply with the Act. The Commission points out that the conciliation agreement does not cover all segregated facilities and only requires that the company make specified alterations in its plant as presently constructed. In addition, according to the EEOC the agreement does not comply with the Commission's model draft requiring a statement from the employer that all facilities will be available to employees without regard to race.

This Court has held that absent clear and convincing proof of no reasonable probability of further noncompliance with the law a grant of injunctive relief is mandatory. *Equal Employment Opportunity Commission v. Rogers Bros.*, 5 Cir. 1972, 470 F.2d 965. In *Cypress v. Newport News General & Nonsectarian Hospital Ass'n*, 4 Cir. 1967, 375 F.2d 648, 658, the Fourth Circuit made an observation, relevant here, that has been cited by this Court several times: "'[P]rotestations or repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance' that the practice sought to be enjoined will not be repeated." *See Rowe v. General Motors Corp.*, 457 F.2d at 359; *Gamble v. Birmingham Southern R. R. Co.*, 514 F.2d at 683. In light of our reversal of its fundamental findings, the district court is directed to reassess the evidence relative to injunctive relief. Unless it can discern and identify clear and convincing evidence that there is no reasonable probability of further non-compliance, the district court should enter a broad injunction against the segregation of all facilities and programs at Stockham.

Injunctive relief against discriminatory selection and training practices and procedures for craft and supervisory positions is also necessary. The district court should enjoin the use of the high school education and age requirements for apprenticeship training until the requirements have been validated by Stockham. *Watkins v. Scott Paper Co.*, 530 F.2d at 1182 and n.31. The company must show that such screening devices are *essential* to the safety and efficiency of the plant. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 245, *citing United States v. Bethlehem Steel Corp.*, and at 250. *See also Stevenson v. International Paper Co.*, 516 F.2d 103 at 116.

As we noted,[60] employees are selected for the apprenticeship program by an overwhelmingly white supervisory staff applying such subjective criteria as "desire" and "apti-

[60] *See* subsection "III.D.5." of this opinion.

tude". In line with *Jacksonville Terminal*, we conclude that the company must ascertain and publicize objective qualifications for the apprenticeship training program. *Watkins v. Scott Paper Co.*, 530 F.2d at 1194. In addition, the district court should direct Stockham to formulate from those qualifications written guidelines for use by supervisors in selecting candidates for apprentice training. Further, the court should mandate the development of procedures to assure that the selection practices are free of discrimination. *See Rowe v. General Motors Corp.*, 457 F.2d at 359; *Watkins v. Scott Paper Co.*, 530 F.2d at 1194.

Similarly, the district court should direct the development of objective, written guidelines for the selection of supervisors. These guidelines too should be publicized. Also, the court should advise the company to structure the selection process so that it includes safeguards to avert discrimination. *See Rowe v. General Motors Corp.*, 457 F.2d at 359; *Watkins v. Scott Paper Co.*, 530 F.2d at 1194. The court should also require the company to recruit management trainees at predominantly black colleges and universities within a reasonable distance from Birmingham.

As we have already observed, the timely application procedure is not an adequate replacement for a system of job posting. The district court should mandate the posting of all job vacancies and the qualifications for apprentice training and supervisory selection. *See Rowe v. General Motors Corp.*, 457 F.2d at 360-61; *Watkins v. Scott Paper Co.*, 530 F.2d at 1194.

Stockham terminated use of the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test in 1971. We leave to the district court the issue whether injunctive relief against such testing is appropriate now. *See Albemarle Paper Co. v. Moody*, 422 U.S. at 436, 95 S.Ct. 2362; *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d at 244. As for the Tabaka Tests, as stated, we remand

the issue of the lawfulness of that testing program to the district court.

Seniority relief is mandatory in this case even if the district court finds the system bona fide. *See Teamsters*, —— U.S. at ——, 97 S.Ct. 1843. The federal courts are empowered to fashion such retroactive seniority as the particular circumstances of a case may require to effect restitution and make whole, insofar as possible. the victims of racial discrimination in job assignments, transfers, and promotions. *See Franks v. Bowman Transportation Co.*, 424 U.S. at 764, 96 S.Ct. 1251.

This Court has reiterated many times that "relief is to be granted within the framework of the 'rightful place' theory." *Gamble v. Birmingham Southern R. R. Co.*, 514 F.2d at 683. *See also Local 189, United Papermakers and Paperworkers v. United States*, 5 Cir. 1969, 416 F.2d 980, 988; *United States v. Georgia Power Co.*, 474 F.2d at 927. In *Franks v. Bowman Transportation Co.*, 424 U.S. at 760 n. 21, 96 S.Ct. 1251, the Supreme Court noted congressional approval of that theory in its enactment of the 1972 amendments to Title VII. The Court also recognized the "presumption in favor of rightful place seniority relief". *Id.* at 779 n. 41, 96 S.Ct. at 1271. The "rightful place" doctrine requires that qualified blacks be given a preference for future vacancies in positions they would have occupied but for wrongful discrimination. *United States v. Hayes International Corp.*, 456 F.2d at 118; *United States v. Georgia Power Co.*, 474 F.2d at 927. We discussed the requirements of the theory in *Bing v. Roadway Express, Inc.*, 5 Cir. 1973, 485 F.2d 441, 450, in the context of employment discrimination in job transfers:

> Thus the rightful place theory dictates that we give the transferring discriminatee sufficient seniority carryover to permit the advancement he would have enjoyed, and to give him the protection against lay-

> offs he would have had in the absence of discrimination. How much seniority the transferee deserves should be determined by the date he would have transferred but for his employer's discrimination.

That date should be selected on the basis of when a black employee possessed the experience necessary to qualify for the job. *Id.* at 451. By showing a pattern of discriminatory practices against the class as a whole, the plaintiffs have established that there are reasonable grounds to infer that individual assignment, transfer, and promotion decisions were made pursuant to the discriminatory policy. As a result, Stockham is required to come forth with evidence to dispel the inference. *See Teamsters*, —— U.S. at ——, ——, 97 S.Ct. 1843; *Baxter v. Savannah Sugar Refining Corp.*, 5 Cir. 1974, 495 F.2d 437, 443, *cert. denied*, 1975, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308. In *Franks v. Bowman Transportation Co.*, the Supreme Court recognized the appropriateness of class-based seniority relief. The district court must conduct additional proceedings to determine the scope of individual relief. *Teamsters*, —— U.S. at ——, 97 S.Ct. 1843; *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d at 444.

Where found to be appropriate by the district court, relief such as red circling[61] and special training for discriminatees[62] may be awarded. Other relief may include "an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights' protected by Title VII." (footnote omitted). *Teamsters*, —— U.S. at ——, 97 S.Ct. at 1867. Also the

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[61] *Stevenson v. International Paper Co.*, 516 F.2d at 112-113; *Watkins v. Scott Paper Co.*, 530 F.2d at 1173 *et seq.*

[62] *Franks v. Bowman Transportation Co.*, 5 Cir. 1974, 495 F.2d 398, 420-21, *reversed on other grounds*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444.

court may establish goals and set timetables in order to bring about Stockham's earliest possible compliance with Title VII. *See Morrow v. Crisler*, 5 Cir. 1974, 491 F.2d 1053, 1056-57, *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d at 139.

B. *Backpay.*

Under 42 U.S.C. § 2000e-5(g) back pay may be awarded where appropriate to victims of unlawful employment practices. In this case the district court concluded:

> The record in this case is barren of any persuasive evidence of tangible economic loss with respect to the class. Furthermore, plaintiffs have not proved the existence of any discriminatory condition or practice at Stockham which would effect earnings and therefore be relevant to the award *vel non* of back pay. Consequently, no back pay is awarded to plaintiffs and the class they represent.

394 F.Supp at 500. We have already determined that the district court erred in finding that the plaintiffs had failed to prove discrimination by Stockham. In addition, the court's conclusion that there is no "persuasive evidence of economic loss" is also clearly erroneous. We therefore remand the issue whether the plaintiffs, and the members of the class they represent, are entitled to back pay to the district court. The court should be guided by the standards established by the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280, as well as by the decisions of this Court. In *Moody* the Court observed:

> It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts "may" invoke. . . . However, such discretionary choices are not left to a court's "inclination, but to its judgment; and its judg-

ment is to be guided by sound legal principles." (footnote omitted).

422 U.S. at 415-16, 95 S.Ct. at 2370. According to the Court, a backpay award should be measured against the purpose of Title VII, to achieve equal employment opportunities:

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

422 U.S. at 417-19, 95 S.Ct. at 2371. Therefore, when a finding of unlawful discrimination has been made,

> backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. (Footnote omitted.)

422 U.S. at 421, 95 S.Ct. at 2373. As this Court explained in *Carey v. Greyhound Bus Co., Inc.*, 5 Cir. 1974, 500 F.2d 1372, 1378, a district court's discretion to deny backpay is narrow:

> "Once a court has determined that a plaintiff or complaining class has sustained economic loss from a discriminatory employment practice, back pay should normally be awarded unless special circumstances are present." (Footnote omitted.)

(quoting from *Pettway v. American Cast Iron Pipe Co.* 494 F.2d 252-53.) The "special circumstances" discussed by Judge Tuttle in *Pettway* are not applicable to this case.

See Pettway v. American Cast Iron Pipe Co., 494 F.2d at 253-56.

A backpay inquiry proceeds in two phases.

> During the first or general phase the class must show its entitlement to backpay. This is presumptively shown once employment discrimination has been found. The second or specific phase allows each discriminatee to present the backpay claim to which he is presumptively entitled unless the defendant bears the burden of proving nonentitlement.

Swint v. Pullman-Standard, 539 F.2d at 103. For purposes of backpay relief economic harm is not a necessary element of the plaintiffs' prima facie case "unless the defendant has shown 'convincingly' by 'statistically fair exhibits' that the class earned 'at least as much as a plant-seniority comparable group of whites.' " *Id.* at 92. The defendant Stockham failed to meet this burden. The conclusion we reached in *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1374-75, is equally applicable here and should guide the district court on remand:

> Since we have held that all black employees hired into the labor department before April 22, 1971 were the victims of discrimination as a result of Goodyear's testing, diploma requirement and transfer policies, we conclude as a matter of law that the members of this class of discriminatees are presumptively entitled to an appropriate award of back pay unless evidence is adduced to establish as a matter of fact that such discriminatory practices did not adversely affect a particular claimant (or claimants). On remand, the initial burden will be on the individual discriminatee to establish that he is a member of the class discriminated against and thus presumptively entitled to recover back wages under the facts pertinent to his individual claim. If an individual proves his claim and

> class status, the burden should appropriately shift to the employer to show by convincing evidence, extenuating circumstances, which would support the conclusion that the individual would never have transferred regardless of its employment practices. . . .

The plaintiffs seek "front pay" as part of the backpay award. In "front pay" relief, a monetary award is calculated to terminate on the date a victim of discrimination attains an opportunity to move to his "rightful place" rather than on the date the order granting relief is entered. *See Patterson v. American Tobacco Co.*, 4 Cir. 1976, 535 F.2d 257, *cert. denied*, 429 U.S. 920, 97 S.Ct. 314, 50 L.Ed.2d 286; *E. E. O. C. v. Enterprise Ass'n Steamfitters, Local No. 638*, 2 Cir. 1976, 542 F.2d 579, *app. pending*. The First Circuit stated in *E. E. O. C. v. Enterprise Ass'n Steamfitters*, 542 F.2d at 590-91:

> It is the date of actual remedying of discrimination, rather than the date of the district court's order, which should govern. . . . We agree with the Government that to hold otherwise is to encourage the union to delay the remedial process rather than to encourage the rapid achievement of the discrimination victims' rightful place.

We agree that there are cases in which such relief is appropriate. The district court should consider the suitability of awarding "front pay" relief in this case in light of the company's long-term resistance to desegregation and to equal employment opportunity for blacks. This may well be one case in which "front pay" relief is factually compelled. In *Patterson v. American Tobacco Co.*, 535 F.2d at 269, the Fourth Circuit noted that a backpay award can be supplemented with post-judgment monetary relief in several ways:

> This compensation should be supplemented by an award equal to the estimated present value of lost

> earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position.
>
> . . . Alternatively, the court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit. Or perhaps counsel and the court can devise some other convenient method of taking all the effects of past discrimination into account.

If the district court concludes that "front pay" relief is required in this case, it should determine which of the *Patterson* approaches is most suitable to the facts of this case.

C. *Attorneys' Fees*

The plaintiffs contend that this Court should direct the district court to make an interim award of attorneys' fees because of the extensive nature of the litigation in this case. We agree. This suit was initiated on October 5, 1966; the trial occurred in February 1974; this Court has decided the liability issues in this opinion. We have emphasized the key role played by "private Attorneys General" in actions involving employment discrimination. *See Rowe v. General Motors Corp.*, 457 F.2d at 360 n. 26; *Gamble v. Birmingham Southern R. R. Co.*, 514 F.2d at 686. In addition, the Supreme Court has stressed the "strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 415, 95 S.Ct. at 2370. There is a danger that litigants will be discouraged from bringing such suits because of the risks of protracted litigation and the extended financial drain represented by such a risk. An award of interim attorneys' fees will prevent extreme cash-flow problems for plaintiffs and their attorneys. This

Court has recognized that interim awards are proper in appropriate cases. *Baxter v. Savannah Sugar Corp.*, 495 F.2d at 447. Here, where the litigation has consumed more than eleven years such an award is appropriate. Otherwise, the danger exists that defendants in Title VII suits may be tempted to seek victory through an economic war of attrition against the plaintiffs.[63]

We reverse the district court's finding that the plaintiffs are entitled to attorneys' fees only in an amount proportionate to the assistance their suit provided to the achievement of a conciliation agreement between Stockham and the EEOC. We remand the issue of attorneys' fees to the district court with instructions to award interim fees to the plaintiffs covering all pre-trial, trial, and appellate work by their attorneys.[64] This amount will of course be subtracted from the sum finally awarded for attorneys' fees for the full course of the litigation.

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[63] In support of their arguments for interim attorney's fees the plaintiffs cite congressional reports favoring the award of interim fees under the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. No. 94-559, 90 Stat. 2641, effective October 19, 1976. *See* S.Rep. No. 94-1011, 94th Cong., 2d Sess. [5 U.S. Code Cong. & Admin. News pp. 5912-13 (94th Cong., 2d Sess., 1976)]; H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. Those references are relevant here.

[64] The district court should be guided by the standards for awarding attorneys' fees in Title VII cases discussed at length in Judge Roney's opinion in *Johnson v. Georgia Highway Express, Inc.*, 5 Cir. 1974, 488 F.2d 714.

VI.

Conclusion

The record in this case reveals that the defendant Stockham is guilty of unlawful racial discrimination in the segregation of facilities and programs, the allocation of jobs, craft training and selection, promotion, and supervisory recruitment and training. We have discussed the broad remedies available to the district court under Title VII for rectifying such practices. Except for backpay relief, nothing the courts can do will change the past. On remand, the future of blacks at Stockham is at issue.

Reversed and Remanded.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

CIVIL ACTION No. 70-178

PATRICK JAMES, ET AL., *Plaintiffs,*

v.

STOCKHAM VALVES & FITTINGS COMPANY, ET AL., *Defendants*

Findings of Fact
and
Conclusions of Law

(filed March 19, 1975)

This case involves individual and class action claims of racial discrimination in certain employment practices of Stockham Valves & Fittings, Inc. ("Stockham") at its Birmingham manufacturing complex. In part the claims are asserted also against United Steelworkers of America, AFL-CIO and its Local Union 3036. Plaintiffs, Patrick James. Horace Harville, and Louis Winston, are black male citizens of the United States and the State of Alabama. Messrs. James and Winston are hourly-rated production and maintenance employees of Stockham; plaintiff Harville retired from his position as a production employee in 1972. The defendant Stockham is a Delaware corporation which is engaged in business in Alabama, and, in the Southern Division of the Northern District of Alabama. The defendant unions are each labor organizations which, at all times material to this lawsuit, have represented the hourly production and maintenance employees of Stockham.

Plaintiffs bring this action individually and on behalf of a class of persons similarly situated.

Jurisdiction is predicated upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e), *et seq.*, and upon 42 U.S.C. § 1981. Claims of plaintiffs against defendant Unions are also predicated upon 29 U.S.C. § 151, *et seq.*

Plaintiffs contend in this case that Stockham, during the relevant period encompassed by this lawsuit has (1) maintained racially segregated employee facilities; (2) assigned black employees to "low paying menial jobs"; (3) has denied promotional, training, and transfer opportunities to black employees; and (4) has used, and is now using, testing, age, and educational requirements which discriminate against blacks.

Plaintiffs further contend that the defendant unions have failed, in violation of law, to fairly represent the black employees in the employ of Stockham.

Plaintiffs do not claim racial discrimination with regard to initial hire, apparently because during the relevant period a substantial majority of the production and maintenance employees employed by Stockham and represented by the unions, was black.

For the violations of law alleged by plaintiffs, as set out above, plaintiffs seek injunctive relief and back pay, individually, and on behalf of the class, from all defendants.

The trial of this case commenced on February 4, 1974, and, with few interruptions, continued until February 22nd. The record is voluminous. The transcript of the testimony, alone constituted nearly 3000 pages. In addition there were numerous depositions, statistical presentations and other exhibits, which were extremely helpful to the Court in the consideration of this case. Each of the parties submitted comprehensive briefs and proposed findings, and conclusions of law. Thereafter, at the Court's request each of the parties was heard in oral argument on the issues involved in the case.

The Court, having fully considered the pleadings, all of the testimony, exhibits and other evidence adduced in the course of the trial, and having carefully reviewed the briefs, proposed findings of fact and conclusions of law submitted by each of the parties, and the oral arguments of counsel, and having further considered the demeanor of the witnesses who testified in this case, and having resolved the credibility issues presented by conflicts in the testimony, and having been otherwise fully advised in the premises, now makes and finds the following Findings of Facts and Conclusions of Law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure:

Findings of Fact

I. Preliminary Findings of Fact

A. General Matters

1. This action has been instituted and maintained under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("§ 1981"). Title VII, among other things, prohibits discrimination in employment based on race. § 1981, in relevant part, provides that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens. This action also has been instituted and maintained with respect to the union defendants under the National Labor Relations Act, 29 U.S.C. § 151 et seq., which, in relevant part, imposes a duty on a union to fairly represent its members.

2. The individual plaintiffs, Patrick James, Sr., Howard Harville and Louis Winston are black male citizens of Jefferson County, Alabama. James and Winston are presently employed by Stockham as hourly production and maintenance employees at its Birmingham, Alabama manufacturing complex and are members and officers of defendant Local 3036 of the United Steelworkers of America

("Local 3036"). Until 1972 when he retired on a medical pension, Harville was employed by Stockham as an hourly production and maintenance employee at its Birmingham, Alabama manufacturing complex and was a member and officer of Local 3036.

3. The defendant Stockham is a Delaware corporation doing business in the State of Alabama and in the Southern Division of the Northern District of Alabama, and is an "employer" within the meaning of 42 U.S.C. § 2000e(b).

4. The hourly production and maintenance employees at Stockham have been represented for collective bargaining purposes by Local 3036 at all times material to this action. The defendant Local 3036 is an unincorporated labor organization and is a local union or subdivision of defendant United Steelworkers of America. Both of these defendants are "labor organizations" within the meaning of 42 U.S.C. § 2000e(d).

5. This action has been brought as a class action under F.R.Civ.P. Rule 23.

6. The number of persons, which plaintiffs define as within their proposed class is so numerous that joinder is impractical. Further, it appears that the claims of the representative plaintiffs are typical of the claims of the purported class and there appear to be common questions of law and fact. Finally, it appears to the Court that plaintiffs James and Winston are adequate representatives of the class.

7. The evidence reflects that plaintiffs have met the requirements of F.R.Civ.P. Rule 23(a) and their allegation is that the defendants jointly have acted on grounds generally applicable to a class of black employees. The facts support a finding that this action may be maintained as a class action under F.R.Civ.P. Rule 23(b)(1) for the purposes of resolving the allegations in the plaintiffs' complaint for the following class: All black hourly production and main-

tenance employees of Stockham who are currently employed and all black persons who have been so employed at Stockham from July 2, 1965 to the date of trial.

8. Each of the named plaintiffs filed charges with the Equal Employment Opportunity Commission ("EEOC") on October 5, 1966, which contained specific allegations of racial discrimination against Stockham. On June 8, 1970, an amended charge of discrimination was filed by plaintiff James with the EEOC which included Local 3036 and the defendant United Steelworkers of America as parties to the previously-filed charges. Plaintiffs received notices of their right to bring suit on or about February 16, 1970, and duly filed the complaint in this action within thirty days thereof, the proper statutory period.

B. Background Matters

(i) Stockham's History

1. The Stockham Pipe and Fittings Company was founded in Birmingham in 1903 and originally manufactured only simple castings and cast iron pipe fittings. The Company moved to its present location in 1918. Stockham has provided free medical and dental services to all its employees since that time, and in 1919, established a branch of the YMCA at Company expense to serve as a center of recreational, social, and religious activities of its employees and their families. In the early 1920's, Stockham became one of the first employers in the Birmingham area to provide hospital insurance plans for its employees (and it continues to do so today). (Stockham Ex. 42)

2. Stockham began manufacturing malleable iron pipe fittings in 1923. The manufacture of bronze valves was commenced in 1935. By 1941, engineering had been completed for the manufacture of iron valves, but production was delayed by World War II until 1946. Also in 1946, a

building which had been erected for the production of artillery shells during World War II was converted into a valve machining and assembly building.

3. In 1948, the name of the Company was changed to Stockham Valves and Fittings, Inc. In 1952, Stockham acquired the Wedgeplug Valve Company of New Orleans. This company was operated in New Orleans by Stockham until 1956, when the New Orleans operation was shut down and moved to the Birmingham plant.

4. Production of steel valves began in 1953. Manufacture of ductile iron valves and fittings began in 1959. Stockham began the manufacture of butterfly valves at the Birmingham plant in 1973.

5. Historically, approximately two-thirds of Stockham's employees have been black. (Stockham Ex. 42 and 51).

(ii) Stockham's Manufacturing Processes and Product Lines

1. Although Stockham has many competitors, no single competitor manufactures all six of Stockham's major product lines at one manufacturing complex.

2. Stockham has a multi-industry, multi-plant complex in Birmingham. It competes in both the pipe fittings industry and the valve industry (and in effect, is six plants in one). The Birmingham complex is, in effect, a cast iron fittings plant, a malleable iron fittings plant, a bronze valve plant, an iron valve plant, a steel valve plant and a butterfly valve plant. Stockham manufactures over 19,000 different products over a broad range of product lines. (Plaintiffs' Ex. 66)

3. The following is a list of the major domestic competitors of Stockham, the locations of their plants, and the major product lines produced at each plant:

Grinnell Corp.	Statesboro, Ga.	cast iron flanges and flange fittings
Grinnell Corp.	Cranston, R. I.	cast iron threaded fittings
Grinnell Corp.	Columbia, Pa.	malleable iron fittings
Kennedy (Grinnell Corp.)	Elmira, N. Y.	Iron valves
Clow Corp.	Tarrant, Ala.	cast iron flange fittings
Eddy Iowa Rich (Clow)	Oskaloosa, Iowa	iron valves
ACIPCO	Birmingham, Ala.	cast iron flange
American Darling (ACIPCO)	Beaumont, Tex.	iron valves
Kuhn Bros. Co.	Dayton, Ohio	cast iron and ductile iron fittings
Union Malleable Mfg. Corp.	Ashland, Ohio	malleable iron fittings
Dart Union Co.	Providence, R. I.	malleable iron unions
Stanley G. Flagg Co.	Stowe, Pa.	malleable iron and cast iron fittings
J. P. Ward	Blossburg, Pa.	malleable iron and cast iron fittings
Crane Co.	Chicago, Ill.	bronze valves, steel valves, some large iron valves, butterfly valves
Crane Co.	Washington, Iowa	iron valves, butterfly valves
Crane Co.	Indian Orchard, Mass.	iron valves, steel valves
Walworth Co.	So. Braintree, Mass.	bronze valves
Walworth Co.	Greensburg, Pa.	iron valves, steel valves, plug valves

Nibco	Nacogdoches, Tex.	bronze valves
Nibco-Scott	Blytheville, Ark.	iron valves
Hammond Co.	Hammond, Ind.	bronze valves
Fairbanks	Binghamton, N. Y.	bronze valves, iron valves
Lunkenheimer	Cincinnati, Ohio	bronze valves, iron valves, and steel valves
Lunkenheimer (Hale Valve Corp.)	Tulsa, Okla.	butterfly valves
Wm. Powell Co.	Cincinnati, Ohio	bronze valves, iron valves, steel valves, plug valves
Jenkins Bros.	Bridgeport, Conn.	bronze valves, iron valves, steel valves
M & H Valves (Dresser Industries)	Anniston, Ala.	iron valves
Milwaukee Valve Co.	Milwaukee, Wis.	bronze valves, aluminum valves, iron valves
Mueller Co.	Decatur, Ill.	iron valves
Pacific States (McWane)	Provo, Utah	iron valves
U.S. Pipe & Foundry	Chattanooga, Tenn.	iron valves
Darling Valve Co.	Williamsport, Pa.	steel valves
Dimco	Oklahoma City, Okla.	butterfly valves
Dover Corp.	Tulsa, Okla.	butterfly valves
James Berry Corp.	Cambridge, Mass.	butterfly valves
Keystone Valve Corp.	Houston, Tex.	butterfly valves
Worchester Valve Co.	Worchester, Mass.	butterfly valves
Rockwell Mfg. Co.	Akron, Ohio	butterfly valves
Henry Pratt Co.	Aurora, Ill.	butterfly valves

4. The following product lines are manufactured at Stockham's Birmingham plant:

a. Cast iron threated fittings are manufactured in sizes ¼" to 8", with accurately designed chamfered threads which provide for tight joints and straight lines. These threaded fittings are primarily used in commercial construction and heating and air conditioning systems.

b. Cast iron sprinkler fittings with working water pressures of 175 pounds per square inch (psi) are manufactured in sizes from 2½" to 8". These fittings are primarily used in the commercial sprinkler industry.

c. Cast iron drainage fittings are manufactured in sizes from 1¼" to 12". These drainage fittings are designed to give an unobstructed flow by making the inside the of the fittings approximately the same diameter as the inside diameter of the wrought iron pipe which it joins. The drainage fittings are used primarily in plumbing and commercial construction.

d. Cast iron flanges and flange fittings are manufactured in sizes 1½" through 24". These flanges and fittings can be used with any type flanged pipe.

e. Malleable iron pipe fittings capable of withstanding temperatures from –20° to 550°F. are manufactured. Malleable iron is a tough, highly ductile iron capable of withstanding pipeline stresses from expansion, contraction, and shock. Malleable iron pipe fittings are used primarily in commercial, institutional and industrial construction.

f. Malleable iron threaded fittings are manufactured in sizes ⅛" to 12".

g. Malleable iron unions and union fittings are manufactured in both flanged and threaded types. The

threaded types are made in sizes from ¼" to 4"; the flanged types are made in sizes 1" to 10". Unions are produced with brass seats, gasket seats, or with integral all-iron seats. Union fittings combine the functions of a fitting and union in one compact assembly. Brass seats are forced into their grooves under tremendous rolling pressure forming a leak-proof joint. All parts are machined and threaded.

h. Malleable ball pattern railing fittings are manufactured in sizes from ½" to 2".

i. Ductile iron pipe fittings are manufactured in threaded and flanged types. The threaded types are produced in sizes from ½" to 6"; the flanged types are produced in sizes from 1½" to 6".

j. Bronze globe, angle, and check valves are made in 125, 150, 200, 300 and 350 psi ratings in sizes ⅛" to 4". The primary markets for these valves are commercial and institutional construction, the chemical industry, and commercial ship building, as well as all general industry and utilities. Service recommendations are for steam, water, oil, gas, or other media up to 550°F. Actual in-line pressures may range up to 1000 psi.

k. Iron gate, globe, angle, and swing check valves are manufactured in sizes ¼" to 36". Primary markets for these valves are commercial and institutional construction, the chemical industry, iron and steel industries, and gas distribution. Iron valves are recommended for media to maximum pressures of 500 psi and maximum temperatures of 450°F.

l. Steel gate, globe, angle, and swing check valves are manufactured in sizes 2" to 30". Primary markets for these valves are power generators, petroleum refining, and the petrochemical and chemical industries.

Twelve cast steel alloys are offered as basic valve materials for services to a maximum pressure of 1440 psi, and maximum temperatures of 1500°F. These materials require magnetic particle testing and sometimes radiography. Careful welding of casting repairs requires stress relieving. Heat treatment of various raw materials is also required.

m. Butterfly valves with iron or ductile iron bodies are manufactured in wafer or lug-wafer type, with wide choice of stem, disc, and liner material for pressures up to 150 psi in sizes 2″ to 12″. Primary markets for these valves are commercial, institutional, and industrial construction.

n. Wedgeplug non-lubricated plug valves are manufactured in sizes ¾″ to 20″. These valves have a patented mechanical lifting device which lifts, rotates, and re-seats the plug. Primary markets for these valves are the petroleum refining and petro-chemical and chemical industries. These valves are used in catalytic cracking and coking operations, and in distribution service in various petroleum or chemical product lines. Service pressures range up to 2160 psi with temperatures up to 1500°F.

o. Slurry valves are manufactured in sizes 2″ to 24″. Special slurry valves are used by aluminum mines and refineries in handling coarse and fine slurries, red mud, and caustic aluminum liquor. These valves are built for rugged heavy-duty service with rigidity and strength to withstand severe corrosive, erosive, and scaling conditions. They are sometimes lined with special alloys such as nickel for corrosion resistance. They are used in services up to 1000°F. and pressures up to 1440 psi.

p. Ductile iron gate, globe, angle, and check valves are manufactured in sizes 2″ to 24″. Primary markets

for these valves are power generation, petroleum refining, and the petro-chemical and chemical industries. Service pressures are up to 720 psi, with service temperatures up to 650°F.

5. There are nationally recognized standards of product quality for the valves and fittings industries.

6. Each product in the product lines manufactured by Stockham meets or exceeds these nationally recognized standards of product quality.

7. Component parts for valve products in the valve products lines at Stockham are machined to extremely close tolerances and specifications so that such valve products may be safely and efficiently used for the purposes for which they are designed and manufactured.

8. Tapping operations upon pipe fittings in the pipe fittings product lines of Stockham are performed to extremely close tolerances and specifications so that such pipe fittings may be safely and efficiently used for the purpose for which they are designed and manufactured.

9. The following is a brief survey of the manufacturing processes involved in each of the product lines at Stockham:

(a) Grey iron castings for fittings and valve bodies are made in the Grey Iron Foundry Department. Molds are prepared by forming the impression of the molding pattern in specially treated sand. Usually a core made of a specially treated sand in the Main Core Room Department is inserted in the center of the mold to form the center opening in the casting, whether it be a fitting or a valve body. Iron from the Yard is loaded into a cupola, melted and poured into the prepared mold. After cooling, the castings are taken from the mold, excess materials on the casting are cut off, and the castings are ground and cleaned,

and then inspected by the Foundry Inspection and Galvanizing Inspection Department. Valve body castings go to the Valve Machining and Assembly Department; fittings and unions castings go to the Tapping Room and Union Assembly Department, except those to be galvanized go first to the Galvanizing Department.

(b) Malleable iron castings for fittings are made in the Malleable Foundry Department. A mold is made by using a pattern and specially treated sand; and usually a core, made in the Main Core Room Department, is inserted in the center of the mold. Molten metal is prepared in a cupola and poured into the finished molds. The castings are then heat treated to give them their malleable properties. The castings are then ground, sheared, and inspected by the Foundry Inspection and Galvanizing Inspection Department. Fittings and unions casting are sent to the Tapping Room and Union Assembly Department, except those to be galvanized go first to the Galvanizing Department.

(c) The Brass Foundry Department principally produces bronze body castings for bronze valves, but it also produces castings, such as brass seat rings, for the other departments. The castings are made by forming a sand mold around a pattern, with a sand core from the Brass Core Room Department inserted in the center. Brass of a specific alloy content is melted in a furnace and poured into the prepared mold. Brass valve body castings are cleaned and inspected by the Foundry Inspection and Galvanizing Inspection Department. Other bronze castings are inspected and sent to the departments where they will be used.

(d) In the Galvanizing Department, fittings and unions are dipped in acid solutions for cleaning. They are then submerged in molten zinc and quenched in water, leaving a coating of rust-proof zinc on the fittings and unions. These fittings and unions then go to the Tapping Room and Union Assembly Department.

(e) In the Tapping Room and Union Assembly Department, threaded fittings have precision chamfered threads machined into them. Flanged fittings are drilled and faced. Other finishing operations are carried out on both types of fittings. The three-piece unions have precision seat rings inserted, are otherwise finished, and are assembled by joining the head to the tail with the nut.

(f) These fittings and unions then pass through the Final Inspection and Union Inspection Department. After inspection, they go to the Shipping Room Department, where they are warehoused.

(g) The Valve Machining and Assembly Department produces an array of sizes and types of valves. Iron valve body castings from the Grey Iron Foundry Department, ductile iron body castings from the Grey Iron Foundry Department, and bronze valve body castings from the Bronze Foundry Department, along with the other valve parts, are precision machined and assembled.

(h) The assembled valves go to the Valve Finishing Inspection Department for inspection and testing. After inspection, the finished valves go to the Shipping Room Department for storage.

(i) The Shipping Room Department warehouses the finished products and fills and ships customer orders.

(j) As the dispatchers decide that a particular item is to be made somewhere in the plant, the Dispatching Department employees take the proper unfinished items to the particular area of the plant for completion of the manufacturing process. For example, the Dispatching Department employees take rough castings to machine operators in the Valve Machining and Assembly Department for finishing and take patterns from the pattern storage area to the molders in the foundries as changes are made.

(k) The Pattern Shop Department makes and repairs patterns which are used to make the impressions in the molds in the foundries.

(l) The Electrical Shop Department does maintenance on all electrical equipment, building wiring, and does new electrical construction on both buildings and equipment.

(m) The Valve Tool Room Department sharpens and maintains the tooling used in the machining of valve parts.

(n) The Foundry Repairs Department is responsible for mechanical maintenance of all equipment in the foundries and for installation of new equipment in the foundries.

(o) The Machine Shop Department maintains plant equipment and performs the types of work common to a machine shop.

(p) The Construction Department keeps the plant buildings in good repair and does construction work on new buildings.

(iii) Working Conditions at Stockham

1. The foundry industry by nature is somewhat hot and dusty but the working conditions at Stockham's foundries are superior to the working conditions of the average foundry in the southeastern part of the United States.

2. The skilled production jobs in foundries include the jobs of core making and molding machine operator. Although these jobs were historically "white jobs" in most places in the southeastern United States, black employees have historically held these more desirable production jobs in Stockham's foundries.

3. Black employees at Stockham are employed in jobs that historically have been held almost exclusively by white employees in the industry. (Stockham Ex. 74)

4. Since 1965, the Birmingham office of the Alabama State Employment Service has had approximately 10,000 job applications per year and has serviced approximately 20% of the unemployed persons in Birmingham (60% of that 20% were black). At no time since 1965 has there been a substantial number (between 5 and 10) of black applicants for jobs as machinists, blacksmiths, electricians, carpenters or pattern makers.

5. Stockham received the Birmingham Urban League's Business Hiring Award for 1973 for hiring more minority referrals from the Birmingham Urban League than any other employer.

6. The working conditions of plaintiffs or the class or classes they represent are not hotter, dustier, or dirtier than the working conditions of white employees at Stockham.

7. The jobs of plaintiffs or the class or classes they represent are generally no less desirable with reference to working conditions than the jobs of white employees at Stockham.

(iv) Stockham's Incentive Pay System

1. The incentive pay system provides extra compensation for the good worker without regard to race and does not discriminate in its operation as a method of determining pay, against plaintiffs, or the class or classes they represent in this action. (Stockham Ex. 51A and B)

2. The incentive pay system divides incentive jobs into direct incentive compensation jobs and indirect incentive compensation jobs. (Stockham Ex. 51A and B)

3. The direct incentive pay system applies to those jobs which are directly concerned with production. (Stockham Ex. 51A and B)

4. The indirect incentive pay system applies to those jobs which support production. (Stockham Ex. 51A and B)

5. The incentive pay system operates solely with reference to jobs, not the race of the employees holding any particular job. (Stockham Ex. 51A and B)

6. The incentive system at Stockham is based upon the Bedaux incentive system which is widely used throughout United State industry.

7. An incentive worker receives an allowance to compensate for: (1) scrapped goods beyond his control; (2) fatigue from heat and other environmental circumstances; (3) auxiliary work; and, (4) personal time.

8. The direct incentive worker is assured the equivalent of a 60 unit hour at his base pay rate.

9. Before an incentive value can be established for a direct incentive job, the method of the job must be standardized. For a job to be subject to standardization it must be repetitive and capable of being performed in a uniform manner or method. Once the method is established, the job is studied and incentive values established.

10. The indirect incentive worker is assured of not less than 65 unit hours, an assured rate equivalent to slightly higher than midway through his pay classification.

11. Some production jobs are not on the incentive system because they are so new the method has not been standardized or because incentive applications are not practical for that particular job. All production jobs capable of being measured and standardized are placed on the incentive system as soon as possible.

12. Maintenance work is not repetitive or uniform and therefore maintenance jobs are not on the incentive system.

13. A direct incentive worker's pay averages approximately 25% over his incentive base pay.

14. Plaintiffs' statistics substantiate the testimony that direct incentive workers actual pay is approximately 25%

over base rate. The unadjusted average hourly rate for white incentive workers is $3.15 and for black incentive workers is $2.98. The unadjusted average actual earnings per hour for white incentive workers is $4.09 and for black incentive workers is $3.91. (Plaintiffs' Ex. 97)

15. As of September 1, 1973, there were 178 white and 869 black incentive employees at Stockham. (Plaintiffs' Ex. 79)

16. The production jobs in the bargaining unit which are under the incentive system of pay are in job classes 2 through 9. (Stockham Ex. 51A and B)

17. The incentive pay system does not discriminate against plaintiffs or the class or classes they represent as a conceptual method of determining pay. (Stockham Ex. 51A and B)

18. The indirect and direct systems of incentive compensation do not discriminate against plaintiffs, or the class or classes they represent.

19. The method by which it is determined that a job qualifies for indirect or direct incentive compensation is not discriminatory against plaintiffs or the class or classes they represent.

(v) Stockham's Merit Rating System

1. For each job classifiation at Stockham there are different levels or gradations of pay for non-incentive employees. (Stockham Ex. 51A and B)

2. A job's classification is determined by evaluating the job and describing it on a point value basis. (Plaintiffs' Ex. 85)

3. To advance from one gradation of pay to the next, beginning with the starting rate for his job class, a non-incentive employee must obtain a predetermined merit score under the merit rating system. (Stock Ex. 51A and B)

4. The merit rating system as it presently operates at Stockham has been in existence since prior to 1950.

5. For non-incentive workers, a higher merit score is required for advancement to each successive gradation of pay within a job class. (Stockham Ex. 51A and B)

6. A new employee is rated at the end of his first three (3) months on the job, at the end of his first six (6) months on the job, and thereafter at the end of each six (6) month period of employment. (Stockham Ex. 51A and B)

7. The performance of all hourly rated employees, both incentive and non-incentive, is rated. (Stockham Ex. 51A and B)

8. The merit score received by a non-incentive employee is used to determine whether he will be given an increase in pay within his job classification. The merit score received by an incentive employee has no effect on his pay. (Stockham Ex. 51A and B)

9. The merit scores received by both incentive and non-incentive employees become part of their personnel records and constitute a record of their performance on the job for a given six (6) month period. (Stockham Ex. 51A and B)

10. The foreman under whose direct and immediate supervision an employee works is the individual who performs the merit rating. (Stockham Ex. 51A and B)

11. The rating is based on the first-hand observation by the foreman of the employee's performance on the job for the prior six (6) months. (Stockham Ex. 51A and B)

12. The foreman performing the merit rating is required to complete form "PE-1" entitled "Personnel Rating" which entails evaluation of the seven (7) following factors: quantity, quality, job or trade knowledge, ability to learn, cooperation, dependability and industry, and attendance. (Stockham Ex. 51A and B)

13. For each of the seven factors listed above, the rater must place a check mark in the block on the merit rating form indicating whether the rated employee's performance over the prior six (6) months has been unsatisfactory, poor, average, superior or exceptional. (Stockham Ex. 51A and B)

14. The terms "unsatisfactory," "poor," "average," "superior" and "exceptional" are defined in written terms on the merit rating form. (Stockham Ex. 51A and B)

15. All merit ratings performed by a foreman are revised and approved by the foreman's immediate superintendent. (Stockham Ex. 51A and B)

16. The completed and approved merit rating form is sent to the Industrial Relations Department where it is graded by Mr. Willard Bagwell, the wage and salary administrator, or someone under his direction. (Stockham Ex. 51A and B) The foreman who evaluated the employee and the superintendent approving the rating do not score the rating. (Plaintiffs' Ex. 85)

17. The merit rating form is graded according to a predetermined numerical table which is applicable to all hourly employees without regard to race. The rating foreman is unaware of the point values assigned to each category. (Stockham Ex. 51A and B)

18. The merit rating system is not used to reduce an employee from one gradation of pay to another. (Stockham Ex. 51A and B)

19. Since June 10, 1970, each foreman is required to review the merit rating with each employee he rated at least once a year pursuant to the collective bargaining agreement. (Stockham Ex. 23 and 24)

20. Since June 10, 1970, an employee who did not receive a pay increase because of his merit rating could ask for a meeting with his foreman, superintendent and committee-

man to discuss his failure to qualify for an increase. (Stockham Ex. 23 and 24)

21. Since June 10, 1964, employees have been urged to discuss their merit ratings with their foremen under the terms of the applicable labor contract. (Stockham Ex. 51A and B)

22. An employee gets a merit increase if he has a sufficiently high score at least once a year whether his supervisor recommends him for an increase or not. (Plaintiffs' Ex. 85)

23. Only infrequently has a supervisor not recommended an employee for a merit increase if the employee scored high enough to receive an increase on his m[illegible]rating. (Plaintiffs' Ex. 85)

24. Stockham's merit rating system does not discriminate against and has not been used to discriminate against plaintiffs or the class or classes plaintiffs represent.

B (sic) Stockham's Departmental Seniority System

1. The preponderance of the evidence reflects that the objective of the Stockham seniority system is to place the best qualified individual on the job in the quickest, most efficient and safest manner possible.

2. Stockham has operated on a departmental basis since at least 1940. The departmental operation was formalized into a seniority system by agreement with Local 3036 in 1949. The departmental operation was practiced by Stockham both prior to and subsequent to unionization, and has continued to be acepted by the unions since that time.

3. The defendant United Steelworkers, through the defendant Local 3036, has been the bargaining representative for hourly workers since 1944, and has represented Stockham's production and maintenance workers at all times material to this action. One of the functions of defendant

Local 3036 is the representation of Stockham's production and maintenance employees in furtherance of their contract demands. The departmental seniority system has been operated and maintained' pursuant to the collective bargaining agreements between Stockham and Local 3036, which have at all times material to this action provided for departmental seniority.

4. The defendant Local 3036 has participated in the collective bargaining negotiations, and the Local 3036 membership ratifies every labor contract between Stockham and the Union by a majority vote before it becomes effective. Between 700 and 1,000 Local 3036 members voted at the two meetings in 1970 and 1973 held to ratify the labor contracts, and the percentage of members at each ratification meeting was between 65% and 70% black employees.

5. Since World War II, the majority of Stockham's employees and the union's members has been black. The majority of the members of the Local 3036 grievance committee and Local 3036's officers have been black employees of Stockham since at least 1967. Plaintiffs James and Winston have been officers in Local 3036 in recent years and they participated in labor contract negotiations. In addition, the defendant Steelworkers staff representative, who aids Local 3036 in contract negotiations is black.

6. While other forms of seniority may have been discussed from time to time, the basic (*i. e.*, written) bargaining proposals submitted to Stockham by the Unions have never requested a change from the existing departmental seniority system and have instead reflected an intention on the part of the Unions to preserve the present seniority system.

7. Under the departmental seniority system employed by Stockham and the Unions, an employee desiring to transfer to a job in his home department or in any other department may apply to do so by filing a timely applica-

tion for that job. There is no job progression at Stockham, so an employee may apply for any job for which he feels he is qualified (including clerical, supervisory, and apprentice jobs). When a job vacancy occurs, all pending timely applications for such job are reviewed. Consideration is given to the skill, knowledge, training, efficiency, and physical fitness of the timely applicants. Where two or more applicants have developed these qualities to the same degree, the applicant with the greatest seniority in the department where the vacancy has occurred is given preference. If an employee changes departments, he has eighteen months to decide whether he wishes to remain in his new department or return to his old department. If he elects to remain in his new department, for layoff protection the employee retains his seniority in his old department until he has achieved equal seniority in his new department. If, during this period of time, he is laid off in his new department, he may return to his old department with the accumulated seniority of both his old and new departments. If, after the eighteen-month trial period, he elects to return to his old department, he retains his seniority in his old department, with time spent in the new department added to that seniority.

8. The Stockham seniority system is predicated in substantial part upon the fact that Stockham's Birmingham operation is a "multi-plant" facility, unique in the industries in which it competes, and in part upon considerations of safety and efficiency.

9. There is no evidence of any acceptable alternative to the departmental seniority system employed by Stockham.

10. Stockham's departmental seniority system neither locks employees into the departments to which they were originally assigned nor deters inter-departmental transfers by employees.

11. Plaintiffs failed to show a single instance of a black employee who desired to move between departments but

elected to remain in his present job for fear of losing his accumulated seniority.

12. Stockham employees, both black and white, transfer from department to department; the number of applications for such transfers indicates that employees are not inhibited from making such transfers by the operation of the seniority system or by any fear of losing seniority.

13. Since there is no job progression (or lines of progression) at Stockham, an employee can apply for any job for which he feels he is qualified. Furthermore, there are no entry-level jobs in the departments through which employees are required to move before obtaining other jobs. An employee at Stockham can transfer directly to any job vacancy within a seniority unit for which he is qualified.

14. At all relevant times black employees have accounted for the large majority of all inter-departmental transfers. Black employees accounted for a low of 59.4% in 1965 and a high of 89.7% in 1968 of all inter-departmental transfers.

15. Where, among applicants for a job vacancy, each has about the same degree of skill, knowledge, training, efficiency, and physical fitness, as evaluated by his foreman, superintendent, and manager, then the applicant with the longest service in the department is given preference for the position. (Plaintiffs' Ex. 24) In filling job vacancies, seniority is not the sole, or indeed primary determinant of which employee is selected.

16. The timely application procedure at Stockham allows an employee to apply for any job in the plant regardless of whether a vacancy currently exists and to be considered for the job when a vacancy occurs. (Stockham Ex. 51A and B) An employee may file applications for any number of jobs and maintain any number of applications simultaneously. There is no need for the employee to continually check job postings.

17. From 1965 through 1973, 609 black employees and 590 white employees have filed timely applications. (DX.62) 26.6% of the timely applications filed by black employees and 31% of those filed by white employees have been granted. (Stockham Ex. 78)

18. Through the timely application procedure, black employees are not dependent on other employees for notice of job openings and are not dependent upon their supervisors for promotion and transfer consideration.

19. An employee moving to a new job may attain minimum competence to perform the job after some period of time, but he may not become a proficient worker in that job for a period of years. If such an employee were allowed to remain on the job in the event of a layoff while his fellow employee, who had many more years on that particular job but fewer total years with Stockham, was laid off, the efficiency of the manufacturing process would be substantially reduced. An inefficient seniority system could ultimately result in reduced employment at the Stockham facility.

20. A preponderance of the evidence reflects that if the seniority system at Stockham were expanded beyond a departmental concept, the resulting inefficiencies could affect Stockham's competitive position and result in discontinuance of some product lines and consequently, a reduction in existing employment of Stockham employees.

21. Stockham employees who have worked in a given department are more familiar with the operations of the department and any safety hazards involved in working in that department. They are able to assume the duties of a job in that department quicker, with less expense, and with greater safety, than employees from outside the department who lack such familiarity.

22. In putting the best qualified man on the job, Stockham must consider not only the safety of the worker, his

fellow workers and the protection and maintenance of expensive manufacturing equipment, but also the maintenance of high standards of product quality in order to insure the safety of the ultimate users of the products.

23. There are equal earnings opportunities in virtually all of the seniority units at Stockham with no department or departments monopolizing the higher paying jobs. For instance in the malleable seniority unit, six of the top 10 wage earners in 1972 were black with one black in a class 3 incentive job earning $10,129.84. Likewise, in the grey iron foundry unit, 9 of the top 10 wage earners in 1972 were black with one black, a class 6 incentive worker, earning $11,250.85. In the brass foundry seniority unit, all of the top ten wage earners in 1972 were black with one black earning $9,375.99. These departments should be compared with the (predominantly white) pattern shop seniority unit, where in 1972, the top 10 wage earners were all white class 13 workers but the highest white earned only $8,866.82. In the valve machining and assembly seniority unit in 1972, the top wage earner was white but earned only $10,217.24. In the valve tool room seniority unit, the top wage earner, in 1972, a white class 13 worker earned only $8,761.60. (Stockham Ex. 87) A thorough analysis of the top wage earners in each seniority unit shows that for the most part the economic opportunities in all seniority units are essentially equal. In ten of the twenty-two seniority units listed in plaintiffs' exhibit 11, the unadjusted black gross earnings *exceeded* unadjusted white gross earnings and in 9 of the 22 seniority departments the unadjusted black hourly earnings *exceeded* unadjusted white hourly earnings. There is no reason to believe that four black workers such as Willie Rooks, Melvin Thomas, Simon Irby and Douglas McCoy, all of whom made more than $9,500 in 1972, would desire to move or transfer from the malleable foundry to the pattern shop, where the top white wage earner, a class 13 worker, made only $8,866.82 in 1972, or to the foundry repairs unit where the top earner made less

than $9,500. (Stockham Ex. 87; Plaintiffs' Ex. 16) The relatively high earning opportunities in the foundries (malleable, brass, and grey iron) suggest that the high number of blacks in these departments results from voluntary choices by these employees to work in those departments where the most money can be made.

24. The evidence introduced by plaintiffs failed to establish that there are demonstrably superior working conditions in certain departments, and this Court finds that the working conditions in various departments at Stockham are generally the same.

25. At no time has Stockham maintained a policy prohibiting transfers between seniority units and there have never been any restrictions on the number of interdepartmental transfers.

26. The record evidence does not support the conclusion that at any relevant time, Stockham's departmental seniority system has discriminated against plaintiffs or the class or classes they represent.

27. The record evidence does not support the conclusion that Stockham's present modified departmental seniority system discriminates against plaintiffs or the class or classes they represent.

28. The record evidence does not support the conclusion that Stockham's departmental seniority system locks black employees into particular jobs, pay categories, or departments.

29. The record evidence does not support the conclusion that black employees remain in certain departments because they fear losing seniority.

C. (sic) Initial Assignment at Stockham

1. Approximately 68% of Stockham's work force is black and the great majority of the membership in Local 3036 is black.

2. The representation of blacks among Stockham production and maintenance employees exceeds the representation of blacks among federal blue collar workers by 89.2% to 185.5% within educational cells. (Stockham Ex. 17)

3. The representation of blacks among blue collar employees of the federal government is 23.7% and among production and maintenance employees at Stockham is 68%. (Stockham Ex. 17)

4. Approximately 11% of the national work force is black and approximately 23.7% (or twice as many) of the federal blue collar workers are black. Approximately 68% (or almost 3 times the local labor market) of Stockham's employees are black.

5. The fact that Stockham's representation of blacks to whites exceeds that of the Birmingham SMSA by 177.6% indicates that job opportunities for blacks at Stockham are superior in relation to the Birmingham labor market as a whole.

6. As pointed out in the findings relative to the seniority system, the seniority units at Stockham were established no later than 1950 and were developed because of functional, nonracial reasons. Black employees work in each seniority department at Stockham. (Plaintiffs' Ex. 9 and 10)

7. The departments at Stockham cannot be analyzed in abstract terms; it is necessary to consider the number of jobs in any department; the type of work performed therein; and, the skills and qualifications required for successful job performance.

8. Stockham's black employees work in jobs often filled by whites at other employers, and black employees have the most desirable production jobs in Stockham's foundries. (Stockham Ex. 74) The more skilled production jobs in foundries in the South and throughout the nation are

the core-making and molding machine operator jobs which historically were considered to be "white jobs" in the foundry industry. Blacks have historically held these jobs at Stockham, and this is one of the explanations for the large number of blacks in the foundry departments. Historically, blacks came to Stockham and requested jobs as core-makers and molding machine operators—jobs they knew to be available to them only at Stockham. Another factor is that the foundry departments offer some of the highest earnings opportunities at Stockham.

9. Since 1965, the Birmingham office of the Alabama State Employment Service has had approximately 10,000 job applications per year and has serviced approximately 20% of the unemployed persons in Birmingham (60% of that 20% were black). At no time since 1965 has there been a substantial number (*i. e.* between 5 and 10) of black applicants for jobs as machinists, blacksmiths, electricians, carpenters or pattern makers.

10. Black employees fill 10 (5%) of approximately 200 craft jobs at Stockham. Five percent is not an underrepresentation of blacks in craft jobs compared to the local and national labor markets.

11. There is no black employee of Stockham who has completed an apprentice program at Stockham or elsewhere which qualifies him as a millwright, machinist, pattern maker, welder, carpenter, electrician, box floor molder, auto truck mechanic, blacksmith or heat treater who is not working in such capacity for Stockham.

12. There is no black employee holding a certificate of eligibility to work as a journeyman millwright, machinist, pattern maker, welder, carpenter, electrician, box floor molder, auto truck mechanic, blacksmith or heat treater who is not working in such capacity for Stockham.

13. Of the 626 employees (251 white and 375 black) employed as of January 1, 1974, who had sought a specific job

when applying to Stockham for employment, 61 [illegible]ne white employees and 53% of the black employees were placed in the job of their own selection. (Stockham Ex. 58)

14. Stockham has provided jobs for many black employees, who, but for their Stockham jobs, would be among the hard-core unemployed. (Stockham Ex. 74)

15. Stockham received the Birmingham Urban League's Business Hiring Award for 1973, for hiring more minority referrals from the Birmingham Urban League than any other employer in the greater Birmingham area.

16. This Court finds that Stockham has at no time made initial job assignments (either to departments or to specific jobs) on the basis of an employee's race.

D [sic] Promotions and Transfers at Stockham

1. The evidence shows that the objective of the transfer and promotion system at Stockham is to get the best qualified individual on the job in the quickest, safest manner possible.

2. The classification of jobs at Stockham into job classes 2 through 13 is a system for rating the complexity of a job or the skills required to perform the job. The complexity and required skills increase as the job class number increases.

3. The job classification system as established and maintained at Stockham does not discriminate against any person on the basis of his race. In the early 1950's for the most part, each of the jobs in the plant was studied and evaluated in terms of job functions. The job classification assigned to any job indicated only the relative skills, abilities and prior training necessary for a worker to perform adequately the particular task.

4. The job classification assigned to any job does not provide any indication of the desirability of the job in terms

of earnings potential or actual working conditions. A comparison which contrasts one employee in job class 4 with another in job class 10 is an abstract comparison; it offers no meaningful comparison of the terms and conditions of the two individuals' employment.

5. The evidence in this case clearly establishes that the job class held by a particular individual normally has very little to do with the amount of his actual earnings because of the incentive pay system at Stockham. Incentive workers typically make approximately 25% more than their base rate of pay, and of the 75 persons in the production and maintenance unit making more than $9,000 per year in 1972, 40 of those employees were in job classes 9 and below.

6. In connection with varying work conditions associated with different jobs at Stockham, plaintiffs failed to prove that there is any correlation between job classification and the quality of work conditions. Allegations of discrimination in work conditions are not susceptible to proof by statistics and plaintiffs had equal access to the type of information required to prove a variance in work conditions. The evidence showed, however, that many of the jobs carrying classifications 10 through 13 involve working conditions which were equal to or worse than some of the jobs which plaintiffs themselves labeled as "hot, dirty and dusty."

7. Two jobs on which plaintiffs spent exhaustive time in an effort to prove them to be "white" jobs were box floor molder (large), a class 12 job, and crane operator, a class 11 job. Plaintiffs failed to establish that either of these jobs possessed more desirable attributes in terms of either compensation or working conditions. The following table, derived from plaintiffs' exhibit 16 which shows the relative earnings of employees within the seniority units, demonstrates that the economic advantages of these jobs are no higher than those jobs held by many blacks.

Name	Race	Job Title	Seniority Unit	1972 Earnings	A *	B **
Ronald L. Parsons	W	Crane Operator	Grey Iron	$8387.12	8th	7
Ernest Kilpatrick	W	Box Floor Molder	Grey Iron	$8170.02	12th	10
Ernest Alverson	W	Crane Operator	Grey Iron	$7833.24	18th	15
Phillip Naylor	W	Crane Operator	Grey Iron	$6937.14	86th	81
William P. Williams	W	Crane Operator	Malleable	$8338.99	25th	20
Ralph D. Mowery	W	Crane Operator	Malleable	$8229.57	27th	21

A * —Rank Within Department
B **—Number of Blacks Within Department Earning More

8. Plaintiffs' failure to prove any correlation between job class and desirable working conditions, coupled with the extensive evidence showing no correlation between job class and actual earnings, demonstrates that no conclusion of racial discrimination can be drawn from the mere fact that the "average" job class for blacks is lower than the "average" for whites.

9. Black production and maintenance employees accounted for a large majority of the inter-departmental transfers between 1965 and 1972. (Stockham Ex. 61)

10. There is no black emeployee of Stockham who has completed an apprentice program at Stockham or elsewhere which qualifies him as a millwright, machinist, pattern maker, welder, carpenter, electrician, box floor molder, auto truck mechanic, blacksmith or heat treater who is not working in such capacity for Stockham.

11. There is no black employee holding a certificate of eligibility to work as a journeymen millwright, machinist,

pattern maker, welder, carpenter, electrician, box floor molder, auto truck mechanic, blacksmith or heat treater who is not working in such capacity for Stockham.

12. Blacks are employed in each seniority department at Stockham. (Plaintiffs' Ex. 9 and 10)

13. Whenever a vacancy occurs, jobs are filled in accordance with the provisions of the labor contract. (Stockham Ex. 51A and B)

14. The factors in determining whether an individual is qualified are set forth in paragraph 1 of Section XIII of the labor contract and consideration is given to the "skill, knowledge, training, efficiency, and physical fitness" of the employees being considered. (Stockham Ex. 51A and B; Plaintiffs' Ex. 24)

15. Where among the employees filing timely applications within the department, each has about the same degree of skill, knowledge, training, efficiency and physical fitness, the employee having the longest service in the department is given preference for job vacancies. (Stockham Ex. 51A and B)

16. A job need not be vacant before an interested employee can file a timely application for the job. (Stockham Ex. 51A and B)

17. The formalized timely application procedure was made a part of the 1970 collective bargaining agreement applicable to the production and maintenance employees of Stockham. (Stockham Ex. 51A and B)

18. The timely application procedure permits an employee to apply for transfer to another job in the plant before a vacancy in the job applied for actually occurs. (Stockham Ex. 51A and B)

19. The timely application procedure permits an employee to maintain simultaneously several current applications for transfer to other jobs. (Stockham Ex. 51A and B)

20. The timely application procedure permits an employee to apply for transfer to another job he desires without the necessity of his regularly checking current job postings to ascertain that there is a vacancy in the job he desires. (Stockham Ex. 51A and B)

21. A timely application is written up for an individual by his foreman at his request and the application is forwarded to the superintendent who retains a copy and sends a copy to the personnel department. A copy is also given to the employee's union representative.

22. Any employee at Stockham can file a timely application for any job at Stockham, although the labor contract relates to hourly jobs only.

23. The timely application procedure was initially formalized in 1965 and became a part of the collective bargaining agreement in 1970.

24. From 1965 through 1973, a total of 1,199 timely applications were filed. (609 by blacks and 590 by whites.) (Stockham Ex. 62)

25. 25.62% of all timely applications filed by black employees and 31.02% of all timely applications filed by white employees since 1965 have been granted.

26. Stockham proposed in the 1973 labor negotiations that supervisors notify in writing the committeeman or in his absence the senior qualified man in a seniority group, of all new jobs or expected vacancies for which timely applications have been filed. (Stockham Ex. 80)

27. According to the current labor agreement, a worker transferring from one department to another at the direction of management has 18 months to decide whether he wants to remain in the new department. If he elects to remain in the new department he will retain his seniority in his home department until he has been in the new depart-

ment as long as he was in the old department. (Stockham Ex. 80; Plaintiffs' Ex. 24)

28. An employee moving to a new job may attain minimum competence after some period of time but may not become a proficient worker in that job for a period of years depending upon the complexity of the job.

29. Stockham introduced extensive testimony regarding the qualifications needed by individuals to perform the critical jobs—the craft, highly skilled and skilled jobs—safely and efficiently, as reflected in the findings of fact, *infra*. The critical jobs are for the most part those jobs in class 10 and above. This evidence was in the form of objective criteria applied to all workers alike. The evidence stands uncontradicted by plaintiffs and when confronted directly, plaintiffs were unable to show a single instance of a qualified black who sought one of these jobs and was rejected while whites of equal or inferior qualifications obtained the job.

30. The relatively small number of blacks in certain high skilled and craft jobs at Stockham is due not to the discriminatory practices of the defendant, but due instead to the absence of qualified black employees.

E (sic) Job Qualifications Essential for Certain Skilled, Highly Skilled and Craft Jobs—The Critical Jobs

(1) Craft and Highly Skilled Maintenance Jobs

1. The jobs of Millwright First Class, Electrician First Class, Carpenter, Patternmaker, Blacksmith, Welder Specialist and Machinist First Class are critical jobs. They are highly skilled, journeyman trade maintenance jobs requiring the completion of an apprenticeship or equivalent job training. Each of these jobs requires the maintenance or operation of expensive equipment and affects the safety of the journeyman and other employees who work around him, or follow behind him, as well.

2. The jobs of Millwright, Repairman, Electrician Second Class, Machinist Second Class, Electric Acetylene Repair Welding and Auto-Truck Mechanic are critical jobs and are highly skilled maintenance jobs requiring considerable training involving the maintenance or operation of expensive equipment, and affecting the safety of the particular tradesman and other employees working with him, or following behind him, as well.

3. There is no formal or automatic line of progression from Repairman to Millwright to Millwright 1st Class, nor from Electrician 2nd Class to Electrician 1st Class, nor from Machinist 2nd Class to Machinist 1st Class.

4. The jobs of Machinist 2nd Class, Electrician 2nd Class, Repairman, and Millwright require significantly more supervision than a journeyman, or 1st Class tradesman, in those trades. They also require some degree of attention from the journeymen in their field of work. Thus, some time and effort of the journeymen is taken up in providing instruction, training, and direction for others working below him in his trade.

5. The aptitude of a prospective applicant for a highly skilled or craft maintenance job may be indicated by the jobs which the applicant has held previously and by his hobbies, which may provide an insight into his interests and skills.

6. More highly skilled tradesmen are trained through the Apprentice Program at Stockham than through on-the-job training.

7. A blueprint reading course and a shop math course are offered by Stockham to employees who are interested in developing, through classroom study after normal working hours, some of the skills necessary for following the highly skilled trades.

Millwright Trade

8. The job Millwright 1st Class at Stockham is a critical job and a highly skilled job equivalent to what is generally known as a journeyman millwright. The duties of the job are highly varied, involving work such as precision leveling and preparation for operation of complex machinery, erection of buildings, and maintenance for and trouble-shooting of equipment. The job requires ability to weld, burn, and do most types of fabrication. Working conditions may be hazardous, including working at heights, working in close proximity to potentially fatal electric currents, and rigging and handling heavy machinery in close quarters. The Millwright 1st Class is a leader and instructor of other men working in the millwright trade. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

9. The job of Millwright at Stockham is a critical job involving many of the same operations as the job Millwright 1st Class, but the skills of the Millwright are developed to a lesser degree than skills of the Millwright 1st Class. A Millwright may be able, by experience and outside study of mathematics, blueprints and mechanics, to move up to the job of Millwright 1st Class. Like the Millwright 1st Class, the Millwright must be able to burn and weld. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

10. The job of Repairman at Stockham, a critical job, is a highly skilled maintenance job and is held by employees who are following the millwright trade, and in some cases, the carpenter trade. The Repairman assists the Millwright and Millwright 1st Class. The job requires some degree of skill in welding and burning. The Repairman does building repair, assists in equipment installation and steel erection, and performs or assists in the performance of the other

duties of the millwright trade. The evidence does not show that a qualified black employee ever applied for the job and was "passed over" in favor of an equally or less-qualified white employee.

11. Though some employees are able through application and outside study to advance from Repairman to Millwright, or from Millwright to Millwright 1st Class, there is no automatic line of progression from Repairman to Millwright, or from Millwright to Millwright 1st Class.

12. If an incompetent or inadequately trained employee undertook to perform the duties and functions of a Millwright 1st Class, he might damage equipment or buildings; he might create a trap or hazard for other employees who came along after him; and, he might expose those people working with him to hazards in the course of installing or maintaining equipment or buildings.

Electrician Trade

13. The job of Electrician 1st Class is a critical job involving the responsibility of handling all electrical maintenance problems, including trouble-shooting electrical and electronic equipment, repairing equipment, and laying out and preparing for the installation of electrical equipment. The Electrician 1st Class must be able to read and interpret blueprints. The job involves the constant exposure to potentially fatal electrical shock, both to the Electrician 1st Class himself and to others who follow along behind him working on equipment which the Electrician 1st Class has wired or repaired. Electricians frequently work at heights, especially in the installation and servicing of lighting and ventilation fans. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

14. The job Electrician 2nd Class, a critical job, is a highly skilled maintenance job and involves many of the

same operations as the job Electrician 1st Class, but the skills of the Electrician 2nd Class are developed to a lesser degree than those of the Electrician 1st Class. With 2 or 3 years' experience in the job of Electrician 2nd Class and with outside study of mathematics, blueprint reading and electrical codes, the Electrician 2nd Class may be able to advance to the job of Electrician 1st Class. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

15. If a incompetent or inadequately trained employee undertook to perform the duties of an Electrician 1st Class, he might expose himself or any other employee who came in contact with electrical equipment to a potentially fatal electrical shock.

Machinist Trade

16. The job Machinist 1st Class, a critical job, is a journeyman craft job requiring the capability of taking drawings, sketches, and other information, and by use of machines common to the machinist trade, preparing new parts or repairing existing parts for various pieces of equipment. The Machinist 1st Class must be capable of operating the majority, if not all, of the machines in the machine shop. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

17. The job of Machinist 2nd Class, a critical job, is a highly skilled maintenance job and requires the operation of at least one, and usually more than one, machine in the machine shop. By operating the various machines in the machine shop over an extended period of time, and by outside study in blueprint reading, in the use of precision measuring equipment, and of elementary information on metals, metallurgy, and methods of machining metals, the Machinist 2nd Class may be able to advance to the job of Machinist 1st Class. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

18. If an incompetent or inadequately trained Machinist undertook to perform the duties of a Machinist 1st Class, he might damage the machine he was operating; he might scrap the material on which he was working; he might cause damage to be done to the machine on which the part he was making was to be installed; and, he might cause injury to other employees or himself.

Auto-Truck Mechanic

19. The job of Auto Truck Mechanic, a critical job, is a highly skilled maintenance job and involves the maintenance and repair of the various pieces of rolling stock used throughout the Stockham plant. There is no entry level job from which a man can progress to the job of Auto Truck Mechanic, and there is no apprentice program for this job. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

Pattern Maker Trade

20. The jobs of Pattern Maker, job class 13, and Pattern Assembly and Repairs, job class 10, are both critical jobs in the Pattern Shop department. The Pattern Maker is a highly skilled craftsman who takes engineering drawings and, by use of hand tools and machine tools, makes a master pattern. From this master pattern, metal patterns for use in making the molds in the foundries are cast. The Pattern Maker takes these metal patterns and finishes them, matching them together perfectly, and places them on a pattern plate so that the two sides of the pattern match perfectly. The job of Pattern Assembly and Repairs is a highly skilled maintenance job involving the repair of patterns through

the use of a variety of hand and machine tools. The job of Pattern Maker and the job of Pattern Assembly and Repairs require similar qualifications. However, the class 13 job demands that the skills involved in working with patterns be developed to a much higher degree than the class 10 job. Employees holding these jobs must have good manual dexterity, for they are working with their hands in very precise work; they must be able to use mathematics such as trigonometry and shop math, including working with fractions and decimals; they must be able to interpret and work from engineering drawings; they must be able to work largely unsupervised; and they must understand the expansion characteristics of the metals with which they will be working. It is almost a necessity that the Pattern Maker shall have completed an apprentice program for his trade. The evidence does not show that a qualified black employee ever applied for these jobs and was "passed over" in favor of an equally or less-qualified white employee.

Blacksmith

21. The job of Blacksmith, a critical job, is a craft maintenance job involving the heating, shaping and forming of metals. No other job at Stockham would directly qualify a man to perform the duties of the job of Blacksmith.

Welder Trade

22. Though the jobs of Union Melt Machine Welding, job class 9, Electric Acetylene Repair Welding, job class 11, and Welder Specialist, job class 13, in the valve Machining and Assembly department are all critical jobs and are somewhat related, the degree of skill required varies greatly from job and job. The Welder Specialist does critical welding on parts for steel valves and overlays of hard facing material on various grades of stainless steel. Different welding techniques are required on different alloys of metal. His work is not repetitive and he must work with a minimum

amount of supervision. The Welder Specialist must have a minimum of two years experience as a welder, and he must pass a test designed to prove his ability to weld on pressure-containing surfaces. The job of Union Melt Machine Welding requires considerably less skill than the job of Welder Specialist. The class 9 job does not necessarily provide training for the class 11 job, which, in turn, does not necessarily provide training for the class 13 job. The degree of skill required in each of these three jobs is clearly distinguishable, with the Welder Specialist job being a craft job and the other two jobs being highly skilled jobs. The evidence does not show that a qualified black employee ever applied for any of these jobs and was "passed over" in favor of an equally or less-qualified white employee.

23. The job Electric Acetylene Repair Welding can provide some training for the class 13 Welder Specialist job, but operation of the Union Melt Welding Machine, class 9, does not provide training in acetylene or electric welding, which are both required in the class 11 Electric Acetylene Repair Welding job. The difference in the degree of skill required between the class 11 job and the class 13 job is considerable.

24. In order to become a class 13 Welder Specialist, the employee must know the various overlays to be applied, the hard facing and how to apply it, and how to weld on various alloys of stainless steel. The types of welding involve difference welding rods, different fluxes, different settings on the welding machine, and different heat settings. There is no training or apprentice program provided by Stockham to prepare a welder to move to the class 13 Welded Specialist job.

25. Welder, job class 10, is a critical job. A Welder is a highly skilled maintenance job in the maintenance department. The job requires skills and extensive training and involves an entirely different type of welding from that which is done in the Valve Machining and Assembly depart-

ment. There is no apprentice program or on-the-job training which leads to the job of welder.

Conclusion

26. Each of Stockham's highly skilled and craft maintenance jobs requires most, if not all, of the following skills or abilities: the tradesman has to be able to read some type of graphic representations, such as drawings, blueprints, schematics, or flow diagrams; the tradesman must be able to read instruction manuals for the installation and operation of equipment and he must be able to read and comprehend basic technical literature; and, the tradesman must be competent in some level of mathematics, ranging from trigonometry for electricians to the use of fractions and decimals with very high degree of accuracy for machinists. Thus, these are all extremely critical jobs.

Each of Stockham's above-described highly skilled and craft maintenance jobs are critical jobs which meet one or more of these criteria: (1) it requires a lengthy training period; (2) it requires high levels of skill; (3) it involves safety of the worker, his co-workers, and the ultimate users of the product; (4) it is essential to the quality of the product; (5) it requires the operation or preservation of expensive and/or dangerous equipment.

(2) Craft and Highly Skilled Production Jobs

27. The jobs of Box Floor Molder (Large), Ductile Melter, G & L Machine Operator, Oven Operator, Crane Operator, Heat Treater, Machine Service Man, and Service Mechanic are all critical jobs and are craft and highly skilled production jobs requiring an apprenticeship or extensive training. Each of these jobs requires the operation of expensive equipment and affects the safety of the particular employee on the job and other employees around him, or those following behind him.

Box Floor Molder (Large)

28. In the Grey Iron Foundry department at Stockham, iron is melted in a cupola. Molds made from specially treated sand are formed on molding units numbered 1 through 4 and in an area called the box floor. The molten iron is poured into the molds, and after cooling, the sand is shaken off. The rough castings which have been produced are cleaned and ground to remove rough spots or imperfections in the casting. Molds for the largest castings are made by hand in the area called the box floor.

29. The molding operations carried out in the box floor area of the Grey Iron Foundry are quite different from the molding operations on Units 1 through 4 in the Grey Iron Foundry. While the molding machine operators on units 1 through 4 may produce hundreds of machine-made molds each day, the Box Floor Molder (Large) may make only 3 molds a day and thus produce only 3 castings in one day. The Box Floor Molder (Large) makes the largest castings—16" pipe size and larger—for both fittings and valves. He works largely by hand, rather than by using a molding machine. He uses a pattern which is generally on a board. Molding sand is placed on top of the pattern in a large box, or flask, which holds the sand in the mold. A "sand slinger" may be used to "sling" sand under pressure against the pattern in the flask. This process is called "ramming" the sand around the pattern.

The job of Box Floor Molder (Large), job class 12, is a highly skilled, critical job. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee. On rare occasions, Stockham is able to hire a journeyman molder who has attained these skills through completion of an apprentice program with some other employer. In most cases, however, the Box Floor Molder (Large) has completed a Stockham apprentice course involving four years of classroom and on-the-job

training. The Box Floor Molder (Large) must be in very good health, and physically tough and strong, because he does relatively heavy work. He must be highly dependable, and he must have better-than-average intelligence. His work is not repetitive—he may not repeat a particular casting for several months. The molds that he makes are for castings which are not high-production items, but are for very special work. The working conditions on the box floor are somewhat less desirable than in other parts of the foundry because not only does the Box Floor Molder (Large) make the mold there, but the molten iron is also poured into the mold at that point. In contrast, on the molding machine lines (Units 1 through 4), the mold is made in one place and placed on a conveyor to have molten iron poured into it at another place. Thus, the Box Floor Molder (Large) is subjected to more heat and fumes than the molding machine operators in the foundries.

The job of Box Floor Molder (Large) differs considerably from the job of Box Floor Molder (Small), job class 7. The Box Floor Molder (Small) makes certain small castings which are not run often enough to make it profitable to run them on the high-production molding machines on Units 1 through 4. That is, the size of the moldings produced by the Box Floor Molder (Small) is the same as those produced on a production unit; but the quantity produced is not great enough to justify producing them on the high-production molding machines. The Box Floor Molder (Small) is not a highly skilled tradesman as is the Box Floor Molder (Large).

30. The job of Box Floor Molder (Large) is a non-incentive job because the work is entirely non-repetitive.

31. The Box Floor Molder (Large), job class 12, works on the box floor under conditions of heat and fumes caused by the pouring of molten iron into the large molds made by the Box Floor Molder (Large).

Ductile Iron Melter

32. Ductile Iron Melter, job class 12, is a critical job. The Ductile Iron Melter operates a direct arc electric furnace to produce ductile iron in the Grey Iron Foundry department. He operates the furnace to change the chemical composition of a 2,000 pound charge of malleable iron so that it has the steel-like properties of ductile iron. Producing acceptable ductile iron is a complicated process involving considerable skill and responsibility on the part of the Ductile Iron Melter. The Ductile Iron Melter must be physically strong enough to work around the heat generated by the furnace in bringing the molten metal to a temperature of 2,800 degrees Fahrenheit. He must be able to read and write and make calculations. He must keep detailed melting records and work closely with the Metallurgical Department in maintaining the proper quality of the ductile iron. He must be extremely adept in using the magnesium alloy which goes into the making of ductile iron in exactly the proper amounts and under the proper conditions. He works largely unsupervised in a very responsible job requiring the exercise of discretion. If the Ductile Iron Melter makes a mistake in the operation of the furnace, the product of the furnace may not be ductile iron at all. The 2,000 pound charge of molten metal must be poured within five to ten minutes after it is prepared. If the iron is poured and it then turns out that the iron is not high quality ductile iron, the metal castings are scrap and the molds have been wasted. The Ductile Iron Melter is subjected to heat, smoke, and gases from the molten iron. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

G & L Machine Operator

33. The critical job of G & L Machine Operator in the valve machining area of the Valve Machining and Assembly

department requires extremely high skills in the operation of precision machining equipment. Each piece of work run on this machine is essentially a one-of-a-kind operation. The G & L Machine Operator must be able to perform shop mathematics, including some geometry and trigonometry. He must be able to read shop drawings, specifications, and blueprints. The skills required by this job are essentially the same as those of a Machinist 2nd Class. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

Oven Operator

34. Oven Operator (malleable annealing), job class 13, in the Malleable Foundry department is a critical job. The Oven Operator is responsible for operating three gas-fired continuous annealing ovens at temperatures of 1,750 degrees Fahrenheit, 24 hours a day, seven days a week. These ovens are used to anneal, or harden, malleable iron and ductile iron fittings. An Oven Operator would first have to serve as a Continuous Annealing Oven Helper, job class 5, over an extended period of time to become completely knowledgeable about the operation of the annealing ovens. The Oven Operator must be highly dependable because he works unsupervised at night and on weekends. Operation of the furnaces is hazardous, and improper operation could cause an explosion. The operator must exercise good judgment to avoid such an explosion which would damage the extremely expensive annealing oven. The Oven Operator must be able to read and follow written instructions. The working conditions of the Oven Operator involve working in heat as great as or greater than that found in the Grey Iron Foundry department. There have been no vacancies in the Oven Operator job for a number of years. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

Crane Operator

35. Crane Operator, job class 11, is a critical job. Crane Operators work outside the grey iron and malleable foundries and inside the grey iron foundry in the box floor area. The cranes they operate are approximately 20 feet above the ground in the box floor area and 60 to 70 feet above the ground outside the grey iron and malleable foundries. The cranes move in three planes: the entire crane moves on tracks, the carriage on the crane moves across the crane from one side to the other, and the clamshell or electromagnet on the crane moves up and down. The crane operator is often called upon to operate the crane in all three of these planes at the same time. The crane operator over the box floor lifts molds, flasks, and ladles of molten iron to be poured into the molds. The outside crane operator primarily unloads railroad cars of raw material and charges the cupolas at the foundries. The operator rides in a cab suspended from the crane. The crane operator must be a highly dependable employee; he must have good eyesight, he must be able to work at heights; he must be able to work in a confined area such as the cab in which the crane operator rides; he must be able to read and write; he must be intelligent; and he must follow instructions well. In charging the cupola, the crane operator must weigh exactly the proper amount of raw material to "charge" the cupola. If the crane operator makes an error in the cupola charge 3,000 to 4,000 pounds of scrap metal will be produced; and if this metal is poured into molds to form castings, the castings will be scrap and the molds will have been wasted. The crane operator must be extremely attentive, for he operates over a large area where other men may be working below him on the ground. An inattentive or careless crane operator could easily injure or kill someone working below him. The working conditions on the outside crane are substantially the same as the outside weather conditions. The box floor crane operator works under conditions essentially the same as those for the Box Floor Molder (Large). He is working

above the box floor area where molds are being poured with molten iron. The crane operator is subjected to the heat, fumes, and dust generated from the pouring of molten iron into the molds on the box floor. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

36. The usual practice in training a Crane Operator, job class 11, at Stockham, is that the man is trained first on the inside crane above the box floor in the Grey Iron Foundry department. Later, when there is an opening on one of the outside crane jobs, the inside crane operator moves to the outside crane, and a new man is trained on the inside crane.

37. The Crane Operator, job class 11, works near the box floor under conditions of heat and fumes caused by the pouring of molten iron into the large molds made by the Box Floor Molder (Large).

Heat Treater

38. Heat Treater, job class 13, is a critical job and a craft production job in the Tapping Room department. The Heat Treater must have a working knowledge of metallurgy in order to be able to treat individual alloys of steel to obtain the desired hardness. There are no courses or apprentice programs offered by Stockham which would train a man in metallurgy; the Heat Treater must acquire this knowledge on his own before he goes on this job. The Heat Treater uses test equipment to test the hardness of the particular metals to ascertain that they are within specifications. He works with limited supervision. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

Machine Service Man

39. Machine Service Man, job class 11, in the Valve Machining and Assembly department is a critical job and a highly skilled production job. The Machine Service Man must be familiar with the various tools, jigs, and fixtures used in the valve machining area. He must be able to use tools such as sharpeners and grinders, and he must be able to read to determine which jobs are scheduled to be performed in the department so that he will have the proper tools prepared as they are needed. He works with minimum supervision, and he must be capable of examining the tooling used by the machine operators to determine which tooling is serviceable and which tooling needs sharpening or repairs. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

Service Mechanic

40. Service Mechanic, job class 13, is a critical job in the Valve Machining and Assembly department and the Tapping Room department. The Service Mechanic must be familiar with the set up and operation of all the machines and all the products in his particular area. In evaluating an employee for this position, Stockham looks at the man's work record, both with respect to quality and quantity, his attendance record, and his dependability. The Service Mechanic must have operated the majority of machines in his department. He must be able to read and write and to communicate orally. He must read shop drawings, blueprints, and job specifications. He must work with a minimum of supervision. His communication skills must include the ability to train new machine operators, and he must communicate orally with the Set-up Men or Service Mechanics on other shifts and with his supervisor. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

Conclusion

41. The job of Molding Machine Operator, job class 5, is a highly repetitive operation requiring little or no judgment in the operation of a largely automated machine. Operation of such a molding machine would not train or qualify an employee to be a Box Floor Molder (Large). Furthermore, there is no correlation whatever between the job of Molding Machine Operator and the jobs of G & L Machine Operator, Crane Operator, Ductile Iron Melter, or Oven Operator.

Each of Stockham's above-described craft and highly skilled production jobs are critical jobs which meet one or more of these criteria: (1) it requires lengthy training period; (2) it requires high levels of skill; (3) it involves safety of the worker, his co-workers, and the ultimate users of the product; (4) it is essential to the quality of the product; (5) it requires the operation or preservation of expensive and/or dangerous equipment.

(3) Skilled Production Jobs

42. Stockham has a number of skilled production jobs which require experienced operators to use complex, expensive and often dangerous equipment. These operators must work with little supervision and must exercise discretion.

43. The critical jobs of Machine Operator (valve finishing), Machine Operator (steel valve finishing), Setup Operator (tapping), Three-Way Flange Fitting Facer and One-Way Facer (Moline), Drill Press Operator, Finishing Union Heads and Tails, Process Inspector, Automatic Screw Machine Operator, Union Melt Machine Welding, Valve Repairman, Pattern Assembly and Repairs, and Teflon Products Operator require skills, capabilities, and/or training not necessary for the highly-repetitive production jobs in the Stockham plant. The evidence does not show that a

qualified black employee ever applied for these jobs and was "passed over" in favor of an equally or less-qualified white employee.

44. Machine Operators, job classes 8 and 9, in the Valve Machining and Assembly department take blank castings and machine them by performing facing, drilling, boring, and threading operations through the use of precision machine tools. The types of machines operated by a machine operator in this department vary with each particular operation.

45. The basic qualifications for a Machine Operator in the Valve Machining and Assembly department are that the Machine Operator must be able to read shop drawings and specifications, he must be able to use precision measuring devices, he must properly set the "speed" (the rate at which the machine, or casting in the machine, turns) and "feed" (the amount that the cutting tool moves into the casting being machined during each revolution of the tool or casting) to insure safe operation of the machine, he must be able to work to tolerances of ten-thousandths of an inch, he must be willing to provide his own precision measuring tools and measuring equipment, and he must be able to use mathematics involving fractions and decimals to high degrees of accuracy and to convert fractions to their decimal equivalents. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

46. The critical jobs of Pattern Maker and Pattern Assembly and Repairs are, respectively, highly skilled and skilled positions requiring the capability of working with metals, and the use of hand and machine tools to high levels of accuracy. The job of Pattern Maker requires the completion of an apprenticeship or equivalent training. Both of these jobs involve skills and capabilities not demanded of repetitive production jobs.

47. The Setup Operator in the Tapping Room Department, job class 7, "sets up", or adjusts, a "battery" of five to seven machines so that they perform the proper tapping operation on either a male or female thread, to prescribed specifications and standards. He also checks the products run on this battery of machines to make certain that they meet the prescribed specifications and standards. The Setup Operator occasionally relieves the Chucker. A Setup Operator, therefore, must have held the job of Chucker in the Tapping Room. Chuckers with the best production and safety records are considered for promotion to the job of Setup Operator. The Setup Operator must be able to read and understand the product specifications; and he must be able to use precision measuring devices such as gauges, squares, and alignment bars. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

48. The Three-way Flange Fitting Facer in the Tapping Room department faces up to three flanges on a fitting at the same time. The One-way Flange Fitting Facer faces one face of a fitting at a time.

49. The Drill Press Operator in the Tapping Room department uses a drill press to drill bolt holes in the flanges of flange fittings. The bolt holes must be drilled precisely so that they will match up with the bolt in any other flange fitting designed to be used with that flange fitting. The Drill Press Operator must be physically tall and strong in order to be able to lift heavy objects to the drill press table which is at a fixed height above the floor.

50. A union, one of the products manufactured by Stockham, is composed of three parts—the nut, head, and tail. In a bronze-mounted union, a brass ring is mounted in the head. The tail fits against this bronze ring, and the nut holds the head and tail together to form a union. The job

of Finishing Union Heads and Tails in the Tapping Room department involves the operation of a machine which does precision machining operations on the head and tail of the union at the same time.

51. In considering employees for the critical jobs of Drill Press Operator, Finishing Union Heads and Tails, and Three-way Flange Fitting Facer and One-way Flange Fitting Facer, Stockham considers the employee's production record with regard to both quantity and quality, his safety record with regard to both equipment and personnel, his attendance, and his willingness to buy the necessary precision measuring tools. Operators on these jobs must be able to read job specifications and shop prints, and they must be physically qualified to do the job. Drill Press Operators, for example, must have considerable height to be able to lift castings to the drill press table. Castings weighing 40 to 50 pounds or more are handled by a hoist, but an operator in these positions may be required to handle weights of up to 40 or 50 pounds many times during the working day. The operator, therefore, must be physically able to perform these duties. The evidence does not show that a qualified black employee ever applied for these jobs and was "passed over" in favor of an equally or less-qualified white employee.

52. The Process Inspector in the Tapping Room department, job class 8, checks the product of the machines to ensure that the product meets quality standards. He must use precision guages, squares, and alignment bars. In considering an applicant for this job, Stockham looks at the applicant's past work record, giving particular emphasis to his quality record and his attendance, dependability, and ability to use precision measuring devices. The Process Inspector must be able to read specifications and job standards; he is called upon to make written reports on the defects he discovers; and he may be required to leave written instructions to a Process Inspector on another shift. He

must be physically able to handle larger manufactured parts in the process of inspecting and gauging them. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

53. The critical job of Automatic Screw Machine Operator, job class 9, in the Tapping Room department and the bronze valve area of the Valve Machining and Assembly department involves setting up, or adjusting, an automatic machine which produces a number of component parts of Stockham's products, such as stainless steel seat rings or brass valve stems in the brass valve area, and union parts in the Tapping Room department. Proper operation and adjustment of these automatic machines requires a high degree of skill. In considering applicants for the job of Automatic Screw Machine Operator, Stockham considers the employee's work record, with regard to both quality and quantity, and his attendance, dependability, and willingness to furnish his own tools and precision measuring equipment. The operator must be able to read blueprints and specifications. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

54. The critical job of Union Melt Machine Welding, job class 9, is a skilled production job which requires many of the skills of a welder but to a lesser degree. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

55. The Valve Repairman, job class 9, in the Valve Machining and Assembly department must be able to read instructions and use hand tools and power tools such as rotary and belt sanders. He must be able to communicate with the valve assembly supervision and the Machine Operators in the valve machining area in the jargon of the Valve Machining and Assembly department. He learns this jargon

over a period of time by working in the valve-producing areas of the Stockham plant. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

56. The Teflon Products Operator in the Metallurgical department must be able to read; he must have good eyesight; and he must be physically able to stand all day while doing his job. The evidence does not show that a qualified black employee ever applied for this job and was "passed over" in favor of an equally or less-qualified white employee.

57. Operation of a molding machine in one of the foundries at Stockham does not qualify an employee for the job of Machine Operator in the Valve Machining and Assembly department. Operation of a molding machine does not involve the use of measuring devices and does not require the reading of blueprints or job specifications. The molding machine does not have revolving parts, and the safety hazard to the operator and employees working around the operator are not as great as they are with the Machine Operator's job. Compared to the machines in the valve machining area of the Valve Machining and Assembly department, the molding machines in the foundries are very simple machines.

58. The Machine Operator in the Valve Machining area must read a shop drawing and be able to follow it to make a good product without consulting his Service Mechanic or foreman.

Conclusion

59. Each of the above-described skilled production jobs is a critical job which requires skills and abilities not acquired in normal repetitive jobs. They each involve the operation of expensive, intricate and complex equipment under little supervision.

60. Each of the above-described skilled production jobs is a critical job which meets one or more of the following criteria: (1) it requires a lengthy training period; (2) it requires high levels of skill; (3) it involves safety of the worker, his co-workers, and the ultimate users of the product; (4) it is essential to the quality of the product; (5) it requires the operation or preservation of expensive and/or dangerous equipment.

II

Findings of Fact With Regard to Alleged Discrimination Against Black Employees as a Class

A. Earnings of Production and Maintenance Employees at Stockham

1. Plaintiffs placed primarily reliance in this case upon an alleged disparity in pay between black and white employees at Stockham as the basis for an inference of discrimination against blacks as a class. Plaintiffs' "statistics" relative to earnings were a simple mathematical averaging of actual earnings reflecting some difference, albeit a small one, between the average earnings of black employees and those of whites. Plaintiffs made no adjustment of any kind for productivity factors which this Court finds, based upon uncontradicted expert testimony, are basic determinants of individual earnings.

2. Dr. James Gwartney, a professor of economics at Florida State University and an associate in the consulting firm, Economic Services, prepared an earnings study of the factors that influence earnings of Stockham production and maintenance employees with particular emphasis on earnings differences according to race or color.

3. Dr. Gwartney received a PhD degree in Economics from the University of Washington and has devoted substantially all of his professional career to the economics of discrimination, an advanced micro-theory and micro-topics.

4. Dr. Gwartney has published a number of articles in various professional journals dealing with discrimination and income differentials and he has presented numerous professional papers dealing with a variety of topics including how discrimination as to earnings should be measured.

5. According to Dr. Gwaltney, productivity factors influence earnings. A productivity factor is the ability of an individual to perform a given job; productivity factors relate to performance. The productivity factors for which Dr. Gwartney adjusted were, by and large, employee characteristics which the employee brought with him to Stockham.

Data Used

6. Dr. Gwartney obtained from Stockham productivity information contained in employee personnel records to aid his study.

7. The data collected, recorded and sent to Dr. Gwartney was gathered without regard to its possible impact on Dr. Gwartney's analysis.

8. Information from the records and files of all production and maintenance employees at Stockham since 1965, whether still employed or terminated, including: the name; race, social security number of each individual; initial job information including department; job title; job code and base pay; current job information as of August 31, 1973; intermediate changes in employment at Stockham since 1965; sex; merit rating for 1965, 1969 and 1973; date of birth; actual earnings and hours worked for 1965, 1969 and 1972; and, years of schooling was collected, recorded and sent to Dr. Gwartney for purposes of his study.

9. Information from the records and files of all production and maintenance employees at Stockham employed as of August 31, 1973, including days absent during 1965, 1969, 1972 and 1973 and prior job experience, was collected, recorded and sent to Dr. Gwartney for purposes of his study.

Methods Used

10. According to Dr. Gwartney's uncontradicted testimony, there are four methods that may be used to study the employment opportunities relative to earnings of a single firm. No one of these methods is conclusive, but collectively they offer strong evidence of the presence or absence of earnings discrimination.

11. The four methods are: (1) Comparison of earnings at the individual firm with those in the local, regional and national labor markets as well as in other firms; (2) Changes in earnings of employees who have been employed by the firm for a long period of time; (3) Earnings of employees recently hired; and, (4) Adjusting earnings for productivity factors by application of the residual statistical technique.

(1) *Comparison with Local, Regional, and National Labor Markets*

10. (sic) An analysis of U. S. Census data shows that there is a strong positive relationship between education and earnings within education groupings; that is, the higher the education level, the higher earnings regardless of race or occupation.

13. An analysis of U. S. Census data also shows that within educational groupings according to skill level among blue collar workers (craftsmen, operatives, labor and service), there is a strong positive relationship between skill level and earnings for both blacks and whites.

14. According to Dr. Gwartney's uncontradicted testimony, the mere existence of a difference in aggregate black earnings and aggregate white earnings is not proof of employment discrimination. Much more than aggregate earnings is needed before earnings differences can be proof of employment discrimination.

15. Dr. Gwartney further testified that comparing the earnings of individuals with different skill levels is misleading. The aggregate earnings differences between two groups of people may lead to unjustified conclusions if productivity factors are not considered.

16. Stockham's non-incentive workers have an unadjusted average hourly rate of $3.85 for white employees and $3.32 for black employees. The unadjusted actual earned rate is $4.24 for white employees and $3.67 for black employees. The unadjusted, average hourly rate for all workers is $3.63 for white employees and $3.08 for black employees; the unadjusted actual earned rate is $4.20 for white employees and $3.83 for black employees. (Plaintiffs' Ex. 96 and 97)

17. The unadjusted earnings of Stockham's black employees are on average approximately 91% of unadjusted earnings of white employees and there is a $.37 per hour unadjusted difference between the earnings of white employees and earnings of black employees. (Plaintiffs' Ex. 90)

18. Within educational groupings, the relative earnings of blacks to whites at Stockham exceeded the relative earnings of blacks to whites in the Birmingham Standard Metropolitan Statistical Area ("SMSA") in 1969 by 11.5% to 70.0%. Not only were the relative earnings of blacks at Stockham greater but the absolute dollar earnings of black production and maintenance employees at Stockham exceeded the earnings of blacks in the Birmingham SMSA in total and within every educational grouping. This difference in favor of Stockham employees is understated somewhat because the data for Stockham included earnings only from Stockham while the income data for the Birmingham SMSA included earnings from all sources.

19. Of the 2,274 Stockham production and maintenance employees who had earnings in 1972 and for whom data on

years of schooling were available, 68% were black (728 white and 1,546 black). Of the 728 whites, 448 (or 61.5%) had 12 years of schooling or more and of the 1,546 blacks, 774 (or 50.1%) had 12 years of schooling or more. (Stockham Ex. 4)

20. The black to white earnings ratio at Stockham for the year 1969 within education groupings was 22.5% to 52.5% greater than the black to white earnings ratio for the South.

21. The black to white earnings ratio at Stockham for the year 1969 exceeds the national black to white earnings ratio for 1969 within education groupings by 17.9% to 38.3%. (Stockham Ex. 8)

22. Stockham's black to white earnings ratio exceeds the black to white earnings ratio of the blue collar workers in the United States by 12.3% to 29.1% within educational groupings. (Stockham Ex. 10)

23. When blue collar workers are divided into their components (craftsmen, operatives, servicemen and laborers), Stockham's black to white earnings ratio exceeds the earnings ratio of each component of blue collar workers in the United States by 27.4% to 43%. (Stockham Ex. 12)

24. Stockham's black to white earnings ratio exceeds that of the blue collar workers employed by the federal government in 1969 by 9.5% to 22.2% within educational groupings. (Stockham Ex. 14)

25. The federal government has a reputation of being a low discrimination employer which has had an overt and vocal policy of non-discrimination for a number of years.

26. Stockham's black to white hourly earnings ratio exceeded that of the federal blue collar workers for 1969 by 5.4% to 16.5% within educational groupings. (Stockham Ex. 16)

27. The black to white earnings ratio at Stockham exceeds the black to white earnings ratio of the federal government within educational cells for both hourly and annual earnings.

28. The representation of blacks among Stockham production and maintenance employees exceeds the representation of blacks among federal blue collar workers by 89.2% to 185.5% within educational groupings. (Stockham Ex. 17)

29. The representation of blacks among blue collar employees of the federal government is 23.7% and among production and maintenance employees at Stockham is 68%. (Stockham Ex. 17)

30. Approximately 11% of the national work force is black and approximately 23.7% (or twice as many) of the federal blue collar workers are black. Approximately 68% (or almost 3 times the percentage of blacks in the local labor market) of Stockham's employees are black.

31. Approximately 25% of the Birmingham SMSA work force is black and 68% of Stockham's work force is black. Stockham's representation of blacks to whites exceeds the representation of the local labor market by 177.6%. (Stockham Ex. 4)

32. Both the annual and hourly black to white earnings ratios at Stockham exceed those of the federal government for 1969. Stockham's representation of blacks to whites exceeded the representation of blue collar workers employed by the federal government in 1969 by 9.5% to 22.2% within educational groupings. (Stockham Ex. 4)

33. Within educational groupings, both the relative earnings of blacks to whites at Stockham and the representation of blacks to whites at Stockham substantially exceed the Birmingham SMSA averages. These facts prove by a great preponderance of the evidence that, relative to the local labor market, Stockham is offering earnings opportunities

on a non-discriminatory basis which black employees find attractive, and the Court so finds. Based on the attractiveness of the relative earnings opportunities at Stockham and the absence of a policy of racial discrimination, there has been a migration of blacks to Stockham.

(2) *Changes in Earnings of Employees at Stockham*

34. The black to white hourly earnings ratio for all production and maintenance employees at Stockham increased from 85.4% in 1965 to 90-92% in 1972-73. (Stockham Ex. 18)

35. The black to white hourly earnings ratio for all skilled, semi-skilled and unskilled workers (those in job classes 2 through 9 and the apprentices) increased from 86.3% in 1965 to 96%-98% in 1972-73. (Stockham Ex. 18)

36. An informal skill level adjustment separates the highly skilled and craft employees as defined by the United States Census and according to the EEO-1 reports Stockham has filed (those employees in job classes 10-13) from the skilled, semi-skilled and unskilled employees (those in job classes 2-9 and the apprentices). (Plaintiffs' Ex. 13)

37. When changes in productivity characteristics of employees are held constant by looking at a similar group of employees, i. e., those employed both in 1965 and 1972, the annual earnings of black employees increased from $4,748 in 1965 to $7,030 in 1972, an increase of 48.1%. The annual earnings of white employees increased from $5,713 in 1965 to $8,014 in 1972, a 40.3% increase. The earnings of black employees increased from 83.1% of those of white employees in 1965 to 87.7% of those of white employees in 1972. (Stockham Ex. 19)

38. In terms of absolute dollars and in terms of percentage rate of change, both the annual earnings and the hourly earnings of blacks at Stockham increased from 1965 more rapidly than those of whites. (Stockham Ex. 19, 20)

39. The earnings increase of skilled, semi-skilled and unskilled black employees (those in job classes 2 through 9 and apprentices) over similar white employees were even greater in both annual earnings and hourly earnings. For this group of employees, the annual earnings gain of black employees was 47.9% as compared with 35.5% for white employees; a relative increase of 9.2%. (Stockham Ex. 21) The hourly earnings gain of black employees was 38.9% as compared with 33.3% for white employees; a relative increase of 4.2%. (Stockham Ex. 22)

40. The earnings gains of blacks employed at Stockham during both 1965 and 1972, whether stated in annual terms or hourly terms, exceeded the earnings gains of whites employed at Stockham during both 1965 and 1972. (Stockham Ex. 19-22)

41. The relative earnings of employees hired since 1965 is a meaningful indicator of employment opportunity policies as to earnings during the 1965 through 1972 period because such employees are less affected by pre-1965 employment practices of both Stockham and other employers.

(3) *Earnings of Employees Recently Hired*

42. Among skilled, semi-skilled and unskilled employees (those in job classes 2 through 9 and apprentices) hired between 1965 and 1972, the annual earnings of blacks exceeded whites in 6 of 11 age-education cells and the black to white annual earnings ratio was 104.5%. (Stockham Ex. 23)

43. The hourly earnings of skilled, semi-skilled and unskilled Stockham employees (those in job classes 2 through 9 and apprentices) hired between 1965 and 1972 show a black to white hourly earnings ratio of 98.9%. Within age and education cells there is a random distribution of earnings ratios with blacks exceeding whites in some cells and whites exceeding blacks in others. This ran-

dom pattern would be expected when a firm offers equal earnings opportunities, according to the expert testimony of Dr. Gwartney. (Stockham Ex. 24)

(4) *Adjusting for Productivity Factors by Regression Analysis*

44. Regression analysis is a statistical technique by which adjustment can be made simultaneously for more than three productivity characteristics. The technique allows one to place a dollar value on each variable reflecting its impact on earnings. In the case *sub judice*, adjustments were made by Dr. Gwartney simultaneously through the use of regression analysis techniques for each of these variables: years of schooling; seniority; skill level; outside craft experience; outside operative experience; absenteeism; merit rating; and, achievement. (Stockham Ex. 30-33) Plaintiffs failed to introduce evidence of such adjustments for either the Stockham earnings data proffered by plaintiffs in this case, or the earnings data proffered by Stockham.

45. According to the uncontroverted testimony of Dr. Gwartney, it is better to adjust for *some* productivity factors than not to adjust for any; by adjusting for those productivity factors capable of measurement or reasonable estimate, it is possible to move toward a comparison of more similar employees in terms of their productivity characteristics.

46. There are different achievement levels for blacks and whites with equal years of schooling which are attributable to such things as differences in public expenditures, family background characteristics, home environment and community environment, and not to differences in intelligence or native ability.

47. Noting quantity of schooling alone is not an adequate productivity adjustment; quality of schooling must also be considered. The achievement level of whites exceeds that

of blacks even when the two groups have equal years of schooling. At grade level 12 the black-white achievement differential is between 2.5 and 3.7 grade. (Stockham Ex. 27)

48. Two national studies indicate that when blacks and whites have an equal quantity of schooling, the achievement factor accounts for lower earnings for blacks measured at between 14.6% and 17.2% in one study and between 12.2% and 18.1% in the other. (Stockham Ex. 28)

49. Because of the educational achievement factor, blacks with the same quantity of schooling as whites would be expected to earn only about 85% as much as whites. (Stockham Ex. 28, 29)

50. Outside craft experience (*i. e.*, previous work experience) of Stockham employees was 2.7 years for whites and 1.2 years for blacks or an average of 1.7 years. Outside craft experience was tabulated in terms of years using the U. S. Census definition for craft jobs. This definition includes military or armed service time as craft skill and possibly accounts for what seems to be a high average of craft skill for both blacks and whites. (U. S. Census; Stockham Ex. 55)

51. At the 96% confidence level, the mean of the range of estimates showed an unadjusted annual earnings differential of $448 in favor of whites. The differential was increased to $570 when seniority was considered (blacks had more seniority than whites). The addition of each of the other seven variables reduced the earnings differential and when all variables were considerd simultaneously, the mean differential was —$299, with the range being between $16 to —$592. When adjustments were simultaneously made for seniority, years of schooling, skill level, outside craft experience, outside operative experience, absenteeism, merit rating and achievement, the annual earnings of whites at Stockham were estimated to be $299 less than the annual earnings of blacks. (Stockham Ex. 30)

52. After adjusting simultaneously for each of the eight factors, the hourly earnings of whites at Stockham exceeded those of blacks by 3.1 cents per hour with a range from +13.3 cents to —7.1 cents. The adjusted hourly wage rate of blacks was 99.2% of that of whites and the adjusted annual wage of blacks was 104.3% of that of whites. (T. Gwartney 2006; Stockham Ex. 30)

(5) *Conclusion*

53. The application of the four methods separately and collectively to the earnings of Stockham's employees causes the Court to conclude that between 1965 and 1973, Stockham offered equal opportunities in earnings to its employees without regard to race.

Miscellaneous Findings As To Earnings

54. The classification of jobs at Stockham into job classes 2 through 13 is a system for rating the complexity of a job or the skills required to perform the job. The complexity and required skills increase as the job-class number increases. Though each succeeding job class has a higher base pay rate than the next lower job class, the job classification system is not determinative of the actual earnings of the workers in the job class. (Stockham Ex. 87). This is true because the job classification (skill-rating) system does not take into account the incentive pay system. Many incentive workers in job classes 2 through 9 have higher actual earnings than the non-incentive workers of job classes 10 through 13. (Stockham Ex. 87)

55. In 10 of the 22 seniority departments at Stockham unadjusted black gross earnings exceeded unadjusted white gross earnings and in 9 of the 22 seniority departments unadjusted black hourly earnings exceeded unadjusted white hourly earnings.[1] (Plaintiffs' Ex. 11)

[1] Plaintiffs listed four departments that are not bargaining unit seniority departments.

56. Of Stockham's hourly production and maintenance workers, 50 whites and 25 blacks earned more than $9,000 in 1972. Of the 74 persons earning more than $9,000 in 1972, 32 were in job class 13; 3 in job class 10; 5 in job class 9; 1 in job class 9(b); 9 in job class 8(b); 1 in job class 7(b); 1 in job class 6; 6 in job class 6(b); 3 in job class 5; 8 in job class 5(b); 3 in job class 4(b); and 3 in job class 3(b). (Stockham Ex. 87) No job class 11 or 12 workers in the entire plant earned more than $9,000 in 1972.

57. Of Stockham's 15 production and maintenance workers earning $10,000 or more in 1972, 12 were white and 3 were black. (Stockham Ex. 87) Three of the 12 white employees held the job of annealing oven operator (job class 13), a job which the evidence showed had not been vacant since the effective date of Title VII.

58. Of Stockham's 15 production and maintenance workers earning $10,000 or more in 1972, 8 were in job class 13; 2 in job class 10; 1 in job class 9; 1 in job class 8(b); 1 in job class 6(b); 1 in job class 5; and 1 in job class 3(b). (Stockham Ex. 87)

59. Plaintiffs failed to show that any stratification in pay on the basis of race exists at Stockham, and failed to show that blacks were not working in the higher paying jobs within the plant.

F. (sic) Stockham's Personnel Development Program

1. The first personnel development class was begun in January, 1960; the second class in May, 1962; and the third class in September, 1966. (Plaintiffs' Ex. 41)

2. Stockham began a period of rapid growth in the 1960's and by 1969 the need for the Personnel Development program increased greatly. Prior to 1969, the program was informal, unstructured and only infrequently used.

3. Blacks have participated in the Personnel Development Program. (Stockham Ex. 51A and B)

4. There is an allocation of positions in the personnel development program among the departments at Stockham and final selection of participants is made by the superintendents.

5. The 1969 Training Committee expected the Personnel Development Program to provide as many as sixty future supervisors during the 1970's. (Plaintiffs' Ex. 43)

6. The Personnel Development Program is a plantwide program and involves only 14 participants per year.

7. Participation in the Personnel Development Program does not insure that a participant will become a first-line supervisor. (Stockham Ex. 51A and B)

8. Some of the purposes of the Personnel Development Program are to afford employees with growth potential, an opportunity to learn, to make a greater contribution, and to advance.

9. One of the purposes of the Personnel Development Program is to afford participants some knowledge of the operations in departments other than those in which they have been employed.

10. The Personnel Development Program is designed to reach outstanding salary and hour rated employees to provide them with a better overall knowledge of Stockham and point out avenues for career planning.

11. Stockham's Personnel Development Program is important to the safe and efficient operation of Stockham's plant.

12. Upon a preponderance of the evidence the Court finds that the Stockham Personnel Development Program did not discriminate against plaintiffs or the class or classes plaintiffs represent.

G. (sic) Stockham's Management Training Program

1. The Management Training Program was instituted in its present form in 1969. (Stockham Ex. 51A and B)

2. Prior to 1969, the Management Training Program was designated as the "Organizational Apprentice Program." (Stockham Ex. 51A and B)

3. Stockham began a period of rapid growth in the 1960's which led in 1969 to the establishment of the Management Training Program.

4. One of the purposes of the Management Training Program is to expose participants to a number of different departments of the Company.

5. Another purpose of the Management Training Program is to provide Stockham an adequate supply of technically trained college graduates who can contribute to and grow within Stockham's operation.

6. A primary purpose of the Management Training Program is to train college graduates to fill key supervisory and management positions. (Stockham Ex. 51A and B)

7. Participation in the Management Training Program or its predecessor, does not automatically insure that the participant will obtain a supervisory or management position. (Stockham Ex. 51A and B)

8. The 1969 Training Committee expected the Management Training Program to provide a minimum of 35 college graduates to fill key supervisory and management positions during the 1970's. (Plaintiffs' Ex. 43)

9. The Management Training Program has always been open to persons of all races and at least one black person has been recruited for and has participated in the program.

10. Participants in the Management Training Program do not come from within Stockham's current work force, but

are recruited primarily from scientific and technological colleges and universities, all of whose student enrollments are racially integrated.

11. Because of the continuing need of Stockham for highly trained, technically-oriented management personnel, the Management Training Program is important to the safe and efficient operation of Stockham's plant.

12. Upon a preponderance of the evidence, the Court concludes that Stockham's Management Training Program does not discriminate against plaintiffs or the class or classes plaintiffs represent.

H. (sic) Stockham's Apprentice Training Program

1. The apprentice training program at Stockham is a dual educational experience involving completion of academic courses and on-the-job training. (Stockham Ex. 51A and B)

2. Stockham has never maintained any policy that the apprentice program is open only to white employees or applicants. In addition, there has never been a policy of excluding blacks from craft jobs.

3. The most efficacious, economical, and efficient means to prepare employees for highly skilled and craft jobs at Stockham is through the apprentice training program.

4. The primary purpose of the apprentice training program is to develop sufficient competent journeymen in each craft specialty to meet present and future needs of Stockham.

5. The number of apprentices in the apprentice training program at Stockham at any one time is determined by the need for apprentices in any particular field and the availability of skilled people to provide on-the-job training for apprentices in that particular field.

6. Prior to 1969 Stockham's need for apprentices was small. Stockham began a period of rapid growth in the

middle and late 1960's and in 1969 recognized the need for a greater number of apprentices.

7. The apprentice training program at Stockham is a demanding, four-year program. It involves a short-range sacrifice in earnings for the prospect of future advancement in not only earnings but also responsibility and prestige. The apprenticeship training program involves approximately 9,000 hours in Stockham's shops and apprentice classes. The apprentice attends classes for two hours each day, two days per week in addition to his normal working hours. (Stockham Ex. 51A and B)

8. The apprentice is paid for the time he spends in class and his rate of pay depends on the number of hours in the apprentice training program he has completed. (Stockham Ex. 51A and B)

9. The academic course work is completed through the International Correspondence Schools, whose business office is located in Scranton, Pennsylvania. When an employee enters the apprentice training program, he must make an initial payment of $60.00 to International Correspondence Schools, and employees in the apprentice training program pay $25 per month to International Correspondence Schools for academic materials. (Stockham Ex. 51A and B)

10. During the on-the-job training portion of the apprentice training program, an apprentice develops considerable skills which could not be obtained from books by working with and under the guidance of journeymen in the trade he is following.

11. An apprentice must sign a written agreement (apprentice contract) to work at, and learn the trade of a craft specialty mutually agreed upon by the employee and Stockham. (Stockham Ex. 51A and B)

12. Apprentices are full-time employees of Stockham. (Stockham Ex. 51A and B)

13. The three sources of personnel for the apprentice training program are employees filing timely applications, employees who demonstrate exceptional ability and who are recommended by supervisors, and individuals employed from outside Stockham. (Stockham Ex. 51A and B)

14. All apprentices, whether old or new employees, are on probation for the first four months of their apprentice training. (Plaintiffs' Ex. 37)

15. A prospective apprentice must have a genuine desire to follow a particular trade, he must have an aptitude for that trade, and he must already possess some degree of skill in that trade. He must be reliable and have a good attendance record.

16. An individual with experience related to the job specialty he is pursuing may be granted advanced standing in the apprentice program. (Plaintiffs' Ex. 38) The evidence shows that advanced standing has been granted for both black and white employees.

17. Upon the successful completion of each 1,000 hour period of the apprentice training program, there is an automatic pay increase. (Stockham Ex. 51A and B)

18. From 1965 to 1970, the starting minimum wage for an apprentice was roughly equivalent to the base rate in job classes 5 or 6. In 1971, through 1972, the starting minimum rate for an apprentice was roughly equivalent to the base pay for job classes 6 or 7. In 1973, the starting minimum rate for an apprentice was roughly equivalent to the base rate for job classes 7 or 8. (Stockham Ex. 59) The increase reflected was part of the effort by Stockham to make the program more attractive to all employees.

19. An apprentice must be at least 18 years of age. (Stockham Ex. 51A and B)

20. Although generally an apprentice must be no older than 30 years of age (time in the military is not computed) at the time of signing the apprentice agreement, a waiver of the age requirement can be granted by the Industrial Relations Manager. (Stockham Ex. 51A and B; Plaintiffs' Ex. 38)

21. The evidence shows that the age requirement is not automatically applied. Since 1965 the age requirement for apprentices has been waived on 4 occasions; 3 times for white employees and once for a black employee.

22. Under the old apprentice contract there was no specific educational requirement (Plaintiffs' Ex. 36), but presently all applicants for apprenticeships generally must have a high school diploma or the equivalent of G.E.D. certificate. (Plaintiffs' Ex. 37)

23. The evidence shows that the educational requirement is not automatically applied. Since 1965 the high school education level requirement for the apprentice program has been waived on 4 occasions, 3 times for white employees and once for a black employee. (Stockham Ex. 60)

24. The evidence fails to show that the age and education requirements generally applicable have had an adverse impact on plaintiffs, or the class or classes plaintiffs represent. In addition, the evidence did not show that employees presently holding the craft jobs to which the apprenticeship program may lead generally lack a high school education.

25. To be considered for apprentice training a person in any department need only file a timely application.

26. Prospective apprentices may file timely applications or be selected by superintendents and approved by the apprentice committee.

27. No black employee filed a timely application for an apprentice job until 1971. (Stockham Ex. 76)

28. The apprentice committee has discussed ways to make the apprentice program more attractive to black employees. It has publicized the program to a greater extent, recommended that the pay rate be made more attractive, and recommended that a bonus be paid upon successful completion of the program. A bonus of $400 is given each apprentice upon completion of the apprentice training program. (Plaintiffs' Ex. 38)

29. A total of 101 individuals have entered the apprentice program since July 2, 1965. Of that total 6 were black employees. (Plaintiffs' Ex. 12A)

30. From 1965 through 1973, a total of 65 timely applications for apprentice positions were filed, 14 by black and 51 by white employees. Of that total 38 were granted, 6 for black and 32 for white employees. (Stockham Ex. 64)

31. Stockham's Apprentice Training Program is important to the safe and efficient operation of Stockham's plant.

32. Upon a preponderance of the evidence, the Court concludes that Stockham's Apprentice Training Program did not discriminate against plaintiffs, or the class or classes they represent.

I. [sic] Supervisors

1. The department superintendent is responsible for selecting individuals to fill supervisor vacancies within the department. He does not consult with other foremen but does consult with higher management. Foremen have no role in the selection of other foremen.

2. When a supervisor opening occurs, the department superintendents selects from two to five candidates for

the job and consults with the manager of production about who will be selected. The criteria for selection of foremen include who is the best man for the job at this particular time based upon such factors as: desire to be a foreman; work performance record; leadership qualities; job knowledge; physical fitness; common sense and good judgment; work habits; dedication to the job; loyalty; and, enthusiasm.

3. There is a relatively low turnover rate among supervisory personnel; the need to select superintendents is rare.

4. In addition to the other criteria for selection of supervisors there is a psychological evaluation performed by a consulting industrial psychologist which is considered.

5. There are 26 foremen working in the Grey Iron Foundry. Two are black and more than half of the 24 white foremen had worked in the Grey Iron Foundry prior to becoming foremen.

6. From 1965 through 1973, there were a total of 12 timely applications for supervisory positions, 9 by black and 3 by white employees. Of that total, 2 have been granted, 1 for a black and 1 for a white employee. (Stockham Ex. 77)

7. Of the 120 persons listed on plaintiffs' Exhibit 11 as foremen, 40 were promoted to foreman positions prior to July 2, 1965. 47 persons were promoted to foreman positions after January 1, 1970, and 5 of those individuals were black. (Plaintiffs' Ex. 11)

8. The position of foreman at Stockham is a salaried, management position outside the purview of the bargaining agreement.

9. The evidence in the record does not reflect that a single qualified black employee was denied a supervisory

position in favor of an equally or less-qualified white employee.

J. [sic] Sales and Clerical Jobs
Clerical Jobs

1. Approximately 20 clerks of the total clerical work force of 140 are black employees.

2. There have been few clerical job vacancies since 1965 and numerous timely applications for clerical jobs. (Stockham Ex. 65)

3. From 1965 through 1973, there were 201 timely applications for clerical positions, 67 by black and 134 by white employees; of that total 26 were granted, 6 for black and 20 for white employees. (Stockham Ex. 63)

4. If more than one applicant for a clerical position meets the general and specific criteria for the job, the best qualified man is selected for that job.

5. The plant clerical jobs are salaried jobs and are not covered by the collective bargaining agreement.

6. Each of the plant clerical positions at Stockham requires aptitudes and capabilities which differ from those required for most of the production jobs at Stockham.

7. The following general criteria are employed in evaluating employees for plant clerical positions: good attendance record; good work record; ability to read and do simple arithmetic; legible handwriting; ability to do simple reports; willingness to work on any shift; average or above average merit ratings; and, being physically qualified for the job. In addition to these general criteria there are other criteria required for each specific clerical job.

8. The Truck-loading Clerk in the shipping department must be able to recognize the approximately 19,000 finished products manufactured by Stockham. This ability to recognize products is acquired over a period of time by working in the Shipping Room picking orders and assembling them for shipment.

9. The clerical jobs called Re-Inspector, 5610 Clerk, and Finished Stock Dispatcher require familiarity with thousands of products manufactured at Stockham. This familiarity is developed by working with these products over an extended period of time.

10. The job of Carton and Stock Dispatcher, in addition to the general criteria for clerical positions, requires familiarity with the thousands of products produced at Stockham and leadership ability. The Carton and Stock Dispatcher must direct the men who work under him.

11. The Inventory Clerk, in addition to the general criteria for clerical jobs, must be familiar with the thousands of products produced by Stockham.

12. The Valve Parts Coordinator in the Receiving department, in addition to the general criteria for clerical jobs, must be able to type 25-30 words per minute and use a calculator.

13. In the Receiving department, there are clerical jobs of Counter Clerk, Junior Receiving Clerk, Receiving Clerk, Senior Receiving Clerk, and Raw Materials Clerk. An employee must hold the job of Counter Clerk before he can move into any of the other positions. An employee must hold the job of Senior Receiving Clerk before he can move to the job of Raw Materials Clerk.

14. The Dispatching department issues line-ups throughout the Stockham plant to ensure an orderly process of manufacture. There are clerical employees in this department known as Schedulers. Schedulers assist Dispatchers in making out line-ups and in ascertaining that production departments are following the line-ups. In addition to the

basic clerical qualifications, Schedulers must have a knowledge of the thousands of products produced at Stockham. This knowledge is obtained over a period of time in working with the various products.

15. The Dispatcher in the Dispatching department is responsible for seeing that the proper material is lined up in the proper manner and run to maintain product flow. The Dispatcher exercises direction over other employees, including the Schedulers. Having held the job of Scheduler is a pre-requisite to moving to the job of Dispatcher.

16. An employee holding the job of Timekeeper or Time Checker in the Industrial Engineering department, in addition to the general prerequisites for a clerical position, must be bondable.,

17. The Production Checker in the various Inspection Departments must be thoroughly familiar with the products of the Stockham plant—a familiarity which can only be acquired over a considerable length of time, and which is usually acquired by working in the Inspection department inspecting the various products as they are manufactured.

18. An employee in a clerical job cannot gain the knowledge of the products produced at Stockham necessary to carry out his clerical job while he is performing the clerical job. To be qualified for a clerical job, an employee must already be familiar with the products of the Stockham plant at the time he first assumes the clerical position. Hourly employees in the Shipping Room learn a great deal about the products at Stockham, but employees who work in the Receiving department learn little, if anything, about Stockham's products.

19. The hourly employees in the Receiving department do not obtain the kind of familiarity with the steel castings purchased by Stockham from outside sources requisite to the performance of clerical duties simply by handling such items with fork lifts and on pallets. The incoming castings

are inspected and the receiving records for these castings are made by employees in the inspection department.

20. The evidence does not show that a qualified black employee ever applied for a clerical job and was "passed over" in favor of an equally or less-qualified white employee.

Sales Jobs

21. The evidence reflects that the only black applicant for a clerical position in the Stockham sales department was hired by Stockham for such position.

22. Production or maintenance experience in the plant does not qualify a person for a job in the sales department.

23. There are approximately 22 people in the sales department at Birmingham.

24. There is only one salesman at Birmingham and he is white. Only one black employee has ever applied for such job; this applicant, the evidence reflects, did not have a good work record and his prior experience was limited to work as a porter and busboy.

25. A good prospect for a Stockham sales position is highly motivated toward a sales career; is willing to transfer anywhere in the country; and preferably has previous sales experience and/or a college education with a major in marketing or business administration and some engineering background.

26. There is no evidence that a qualified black representative of the class ever applied for a job in the Sales department and was "passed over" in favor of an equally or less-qualified white employee.

K. (sic) Facilities at Stockham

(i) General

1. On or about June 24, 1965, Stockham by written notices advised its employees that Stockham would comply with Title VII of the Civil Rights Act of 1964. (Stockham Ex. 51A and B)

2. It is and has been Stockham's announced policy that the facilities at the plant were and are available for use by all employees. (Plaintiffs' Ex. 61)

3. Stockham maintains at its own cost and expense free medical and dental facilities, for the benefit of its employees without regard to race. (Stockham Ex. 51A and B)

4. The use of the dispensary, water fountains, time clocks, pay windows, and the assignment of identification badges have been conceded by plaintiffs not to present discrimination issues in this case.

5. During the relevant period involved in this case, Stockham has not maintained separate entrances, badge numbers, time clocks, card racks, or water coolers for black and white employees. (Stockham Ex. 51A and B)

6. All buildings and other facilities constructed by Stockham since July 2, 1965 which contain water coolers, restrooms, lockers, or showers provide common facilities used by both black and white employees without regard to race. (Stockham Ex. 51A and B)

(ii) YMCA

7. The YMCA at Stockham is a Company-sponsored, employee-services program. The YMCA program, established in 1918, derives its entire support from Stockham. (Plaintiffs' Ex. 61)

8. The various functions and activities of the YMCA at Stockham have been conceded by the plaintiffs not to present discrimination issues in this case.

(iii) Stockham's Conciliation Efforts

9. After the plaintiffs filed their charges with the EEOC, Stockham attempted to conciliate the facilities issue with EEOC representatives on numerous occasions. After plaintiffs instituted suit, Stockham continued its conciliation efforts. Plaintiffs' charges were referred to conciliation by the Court on Stockham's motion in September, 1971. Thereafter, the evidence reflects that in September, 1971 Stockham officials met with the chief conciliator of EEOC in Birmingham; and in January, 1972 met with him again in Birmingham for conciliation purposes. In February, 1972, Stockham officials went to Washington for a scheduled appointment but the EEOC representative was not there. A meeting was arranged by Stockham but not kept by the chief conciliator of EEOC in April, 1972. Stockham met with EEOC officials again in Washington in August, 1972. In December, 1972 Stockham officials met with the Deputy General Counsel of the EEOC in Washington, but received no further communication from the EEOC on the plaintiffs' charges. The Court finds that Stockham was actively seeking to conciliate the facilities issue at all times relevant to this action.

10. Conciliation efforts by Stockham again began in February 1973, on an unfair employment practice charge not involved i :his case. Such efforts proved successful, Stockham entering into a written agreement with the EEOC with respect to facilities, on January 21, 1974. (Stockham Ex. 34)

11. Under the Stockham-EEOC conciliation agreement Stockham agreed to: (1) revise and rearrange its restroom facilities in the shipping room, valve shop south, brass building, malleable foundry and tapping room; (2) eliminate a portion of a wall in the main bathhouse and to reassign all lockers; (3) remove the partition in the cafeteria; and, (4) conduct the YMCA programs under the management and direction of the single YMCA Board. Stockham further agreed that all construction contemplated by such

agreement was to be complete by August 31, 1974, and that notice of the availability of all facilities and activities without regard to race was to be posted. (Stockham Ex. 34)

12. Plaintiffs have failed to establish from the evidence adduced, the existence of any allegedly discriminately maintained facility in the Stockham Plant which was not the subject of the Conciliation Agreement of January 21, 1974. There are two female restrooms which are located in the dispensary and not mentioned in the Conciliation Agreement, with respect to which Plaintiffs have failed to establish racially discriminatory practices.

13. Since December, 1973 there has been one YMCA Board consisting of nine whites and nine blacks.

14. Black and white employees utilize all eating facilities at Stockham.

L. (sic) Stockham's Employment Testing Practices

Testing Prior to 1965

1. Throughout the 1950's Stockham experimented with a variety of different aptitude tests for use in various employment situations.

2. At least since the middle 1940's Stockham has had a continuing relationship with Dr. Otis McMahon, consulting psychologist, who evaluates candidates for "key" management positions utilizing aptitude testing and other tools. Specifically, an aptitude test battery has been utilized by Dr. McMahon to screen candidates for the Management Training Program and its predecessor, the Organizational Apprentice Program.

3. In 1953 Stockham began administering the Bennett Mechanical Comprehension Test to screen candidates for its apprentice program. A clerical test has been utilized to screen candidates for clerical positions.

4. Stockham did not require a more comprehensive aptitude testing program until the middle 1960's when it began expanding and, concurrently, selection problems became more difficult.

Testing Practices Between August 1965 and April 1971

5. In August 1965, Stockham implemented a testing program—for initial employment, promotion or transfer—utilizing the Wonderlic Personnel Test. According to Dr. Barrett, who reviewed Stockham's use of tests in 1968, the Wonderlic test is an "old and popular test" (Stockham Ex. 74) which "has long been recognized as a reliable measure of mental ability". (Plaintiffs' Ex. 14, p. 4)

6. The Wonderlic test was administered in order to provide an improved tool in selecting personnel.

7. At all times within this period, the Wonderlic test was administered in accordance with instructions in the Wonderlic Manual.

8. On October 7, 1966, Mr. Herbert Stockham formally adopted the standards set out in the Wonderlic Manual except for candidates for promotion within a department; in that circumstance, the required score was significantly lower since the company had other evidence of potential (the employee's Stockham work record) to evaluate.

9. For applicants for employment and for applicants for transfer to jobs outside their department, the minimum eligibility scores on the Wonderlic were: wage classes 1-5—5; 6-8—15; wage classes 9-13—19; for promotions within a department the minimum eligibility scores on the Wonderlic were: wage classes 1-5—0; wage classes 6-8—8; wages classes 9-13—15.

10. For promotion and transfer of Stockham employees, factors other than test scores were considered: The employment record, merit ratings, and past production per-

formance record reflecting adequate skills, knowledge, training, efficiency, and physical fitness to perform the job.

11. Applicants for apprentice jobs were required to score 18 on the Wonderlic; applicants for clerical positions were required to score 20 on the Wonderlic.

12. The Court finds no competent evidence in the record to demonstrate that the Wonderlic test, as administered at Stockham in the period from 1965 to 1971, had any adverse impact upon black applicants for employment, promotion or transfer.

(a) Plaintiffs rely upon a national survey, *Negro Norms,* which states: "A very stable differential in raw scores achieved by the Negro applicant population exists". That difference nationally is approximately eight points. (Plaintiffs' Ex. 14, p. 3)

(b) Both plaintiffs' and defendant's expert testing witnesses testified that this survey cannot be reliably used to draw any conclusions with respect to the administration of the Wonderlic test at Stockham since, quite possibly, score of blacks and whites at Stockham may well have been substantially different from those reported in *Negro Norms.* The Court finds the Wonderlic survey is not probative of test performance of Stockham employees, and it does not constitute competent evidence that blacks at Stockham failed to do as well as whites on the Wonderlic.

(c) The Equal Employment Opportunity Commission's Guidelines on Employment Selection Procedures do not sanction the use of validation evidence from other employers in preparing a validation study except in limited circumstances which plaintiffs have not demonstrated exist in this case. 29 C.F.R. § 1607.7.

(d) Dr. Barrett, plaintiffs' testing witness, performed management consultation services for Stock-

ham with respect to its personnel practices in 1968. In that capacity, he proposed that the use of the Wonderlic test be studied to see if it had a racial impact, but he did not make any assumption that the Wonderlic would have an adverse impact upon blacks merely because it was a test of mental ability.

(e) Plaintiffs presented no evidence to the effect that the average score of blacks at Stockham on the Wonderlic test was any lower from the average score of whites at Stockham on the Wonderlic test; nor do plaintiffs offer any explanation as to why such a showing was impossible or unnecessary.

(f) The Court finds that the only evidence which even suggests a possibility that the mean scores of blacks and whites were different was the testimony of Dr. Joan Haworth, Stockham's data processing expert, who testified that there was a difference between the scores of whites and blacks which she could not recall.

(g) Dr. Haworth's recollection is not useful since the data which she recalled was admittedly incomplete. Because of the incomplete data, the Court finds no competent evidence that the supposed difference (which Dr. Haworth recalled from her incomplete study) reflected an actual disparity between the scores of black and white Stockham applicants or employees in the period from 1965 to 1971.

(h) Plaintiffs failed to relate any supposed difference in test performance by blacks and whites to the Wonderlic cutoff scores actually utilized by Stockham from 1965 to 1971.

(i) During the period that the Wonderlic was administered, the percentage of black employees in the production and maintenance unit ranged between 67% and 72%. In 1972 (the calendar year immediately fol-

lowing the cessation of all testing at Stockham), blacks continued to constitute about 67% of Stockham's production and maintenance work force. No increases in percentage of blacks, which would have been anticipated if the Wonderlic had a disproportionate impact upon blacks, occurred as a result of discontinuance of the Wonderlic test as a condition of employment in April 1971.

(j) During the period that the Wonderlic was administered, 31.2% of black timely applications were granted, while 35.9% of white timely applications were granted.

(k) Black employees, in the period from 1965 to 1971, accounted for 63% to nearly 89% of all interdepartmental transfers.

(l) None of the personnel officials at Stockham recalled that the Wonderlic had a discriminatory effect upon black applicants or candidates for transfer or promotion.

(m) The Court finds no persuasive evidence in the record to the effect that blacks were disproportionately disqualified from employment, promotion, or transfer as a result of Stockham's use of the Wonderlic test; on the contrary, the evidence presented at trial wholly supports the finding made herein, that there was no discernable impact upon black employment opportunities attributable to the Wonderlic test.

13. In 1969 or 1970, Jack Adamson observed that black candidates for the apprentice program were not scoring as well as whites on the Bennett Mechanical Comprehension test.

14. Mr. Adamson discussed the difficulty which blacks were having with the Bennett test with Stockham's consulting psychologist and the cutting score for blacks on the Bennett test was lowered from 45 to 35. White applicants

still were required to score 45 on the Bennett Mechanical Comprehension test to qualify for the apprenticeship program.

15. Stockham ceased all employment aptitude testing in April 1971 and did not undertake the use of any employment aptitude tests thereafter, other than the Tabaka tests, hereafter described.

The Tabaka Tests—The Validation Study

16. In early 1973, Stockham retained the management consulting firm of Victor Tabaka & Associates, Inc. to develop a testing program to assist it in employee selection. Thereafter, Mr. Tabaka and his staff undertook a study to identify and validate those selection tests which appeared to show promise of validation in specific job applications.

17. The approach which Mr. Tabaka utilized was a concurrent, criterion-related validation study. That is, Mr. Tabaka identified the relevant criteria for success on the jobs subject to study; obtained ratings on the relevant criteria from first line supervisors of employees subject to the study; selected and administered aptitude tests, which measured the traits in question, to the subject employees; and, utilized standard statistical techniques to determine whether the test score had any statistically significant relationship to the supervisor's ratings on the success criteria.

18. The concurrent, criterion-related validation method is an acceptable approach under both the Equal Employment Opportunity Commission's Guidelines on Employment Selection Procedures and the American Psychological Association's Standard for Educational Tests and Manuals.

19. The principal advantage of a concurrent validation study, as opposed to a predictive validation study, is that it permits validation to be completed reasonably promptly and does not require an employer to waive existing hiring standards in order to obtain subject employees; the disad-

vantage of a concurrent validation method is that the subject pool is restricted, in that the test is not administered to persons who were not employed, or persons who, because of their ability, have been promoted to higher positions. This phenomenom, known as restriction in range, results in an understatement of the relationship between the test and the success criterion.

20. The Court finds that Mr. Tabaka undertook the study with a great deal of care, and utilized independent consultation to verify his approach.

(a) Prior to and during the study, Mr. Tabaka discussed the proposed undertaking with Dr. William Enneis, a testing expert with the Equal Employment Opportunity Commission.

(b) Mr. Tabaka also consulted with Dr. Jan Mize, a statistician at the Georgia State University, with respect to the statistical techniques which he utilized.

(c) Dr. Mize also selected six studies at random and recomputed the mathematical calculations.

21. Prior to beginning his study, Mr. Tabaka toured the manufacturing facility at Stockham in order to become generally acquainted with its varied production and maintenance operations.

22. Mr. Tabaka carefully reviewed written Stockham job descriptions for hourly-rated jobs to aid in assessing job content.

23. In circumstances where Mr. Tabaka had any question as to job content, he personally observed the job; and, frequently, he discussed job content with the employee who actually performed the job.

24. Thereafter, Mr. Tabaka prepared his "Job Qualifications Form" and distributed it to supervisors who were familiar with the job to obtain their judgment as to performance characteristics necessary for adequate job performance.

25. With the job content thus catalogued, Mr. Tabaka screened the positions to determine those which would be suitable for inclusion in his validation study. He employed two criteria: (a) the kind of skills and ability required in the job had to offer promise of being tested with a paper and pencil test; and (b) the job had to have a sufficient number of incumbent employees under a single supervisor to permit statistical comparison.

26. After selecting jobs which offered promise for test validation, Mr. Tabaka obtained performance ratings from first-line foremen who had day-to-day contact with the subject employees.

27. Mr. Tabaka personally met with the prospective raters to ascertain that they were properly instructed:

(a) Prior to rating any employee, the rater had to have first-hand knowledge of employee performance in the trait in question.

(b) Additionally, if the rater believed that the trait in question was not essential for job performance, Mr. Tabaka eliminated that characteristic.

(c) Each rater received written instructions with respect to the traits which he was to rate.

(d) Mr. Tabaka cautioned the raters about the "halo effect" (a phenomenon in which strong positive or negative characteristics in one area tend to influence judgment as to other areas), which would bias the performance ratings.

(e) Mr. Tabaka asked the raters to rank each of their employees with respect to each performance characteristic. Thereafter, the raters were asked to evaluate their employees on a quantitative objective scale.

(f) Where the rater ratings and the rater rankings were in conflict, Mr. Tabaka rejected the particular rating.

28. Mr. Tabaka administered the five tests which constitute the Tabaka Test Battery (coordination test, space visualization test, personnel placement test, arithmetic test and the Bennett Mechanical Comprehension test) to the subject employees.

29. Mr. Tabaka personally observed test administration and he judged that he obtained cooperation from the subject employees.

30. Mr. Tabaka removed the tests to his offices in Atlanta, where they were scored by his staff.

Statistical Techniques

31. In analyzing the Stockham data three statistical correlation techniques were utilized—the Pearson Product Moment Correlation Coefficient Formula, the Chi-square array method and the Phi coefficient.

32. The Pearson Product Moment Correlation Coefficient Formula was the correlation method relied upon in the Tabaka study for the purpose of determining whether to use a test.

33. The Chi-square method was also utilized for correlation analyses, but it is undisputed that this technique was supplemental only; a Chi-square result did not form the exclusive basis for a recommendation to use, or not use, any particular test.

34. The Phi Coefficient formula was used to correlate data generated from the small samples of black employees.

35. Mr. Tabaka judged each correlation result by probability tables to ascertain whether they were statistically significant. He employed the Equal Employment Opportunity Commission's definition of statistical significance, *i. e.*, that there may be no more than one chance in twenty that the derived correlation coefficient could have been obtained by chance.

36. Mr. Tabaka also analyzed the validity of the tests for black employees separately in those cases where there was a sufficient number of subject employees.

37. Although there were frequently few blacks in the high skilled jobs (for which blacks were generally not qualified), Mr. Tabaka testified: "It was a question as to whether we ignore those groups or whether we make a calculation based on what was available and we felt it was worthwhile to get a start by taking the persons who are available."

38. In each case where Mr. Tabaka obtained a statistically significant coefficient of correlation, he established a failure probability score by the array which he also used to calculate Chi-square.

39. On the basis of the separate correlation calculations for blacks, Mr. Tabaka established a separate failure probability score for blacks where indicated. Additionally, where Mr. Tabaka was unable to obtain a statistically significant correlation for blacks, he did not recommend the use of a particular test for blacks even where the test was recommended for whites seeking the same job.

40. Mr. Tabaka recommended that Stockham continue to accumulate additional data for supplemental validation purposes.

The Use of the Tabaka Tests

41. The Tabaka tests have been in use at Stockham since July 17, 1973.

42. As of trial, no employee had been disqualified for promotion, transfer or employment on the basis of failing to attain the Failure Probability Score on a Tabaka test.

43. The Tabaka tests are actively considered in selection decisions; however, no employee has been disqualified on the basis of the Tabaka tests, even though some have failed to attain the failure probability score.

44. The Court finds that Stockham does not interpret test scores mechanically, and that testing simply provides another source of information with respect to a candidate for a particular job.

The Expert Testing Testimony

45. Both plaintiffs and Stockham presented expert testimony with respect to the Tabaka validation study. Dr. Richard S. Barrett, an industrial psychologist, testified for plaintiffs, while Dr. Philip Ash, also an industrial psychologist, testified for Stockham.

46. Dr. Barrett has appeared on behalf of plaintiffs in 31 employment discrimination cases prior to this one; on no occasion has Dr. Barrett testified on behalf of an employer in an employment discrimination case.

47. Dr. Ash has testified with respect to testing issues for both plaintiffs and defendants in employment discrimination cases. Dr. Ash has also served as a consultant to the Office of Federal Contract Compliance and the United States Equal Employment Opportunity Commission in connection with the development of regulations setting out standards for appropriate test validation.

48. Dr. Barrett was employed by Case & Co., a management consulting firm, in 1968 when Case & Co. was retained to consult with Stockham about its personnel practices.

49. Dr. Barrett visited Stockham on several occasions while he was employed at Case & Co. In 1968, he also made a proposal to Stockham to review its testing practices but his proposal was rejected.

50. In the course of his testimony, Dr. Barrett was called upon to testify upon the materials which he had reviewed and commented upon in the course of his management consultation services with Stockham.

51. In his testimony, Dr. Barrett criticized the format of Mr. Tabaka's report, claiming that it should be judged by the APA's "Redbook" and the Equal Employment Opportunity Commission's Guidelines concerning the presentation of validation evidence.

52. Dr. Ash did not concur with Dr. Barrett's judgment. He testified that the Redbook was "totally inapplicable" and that Mr. Tabaka's report was completely acceptable for the purposes for which it was prepared, and the Court so finds.

53. The Court also finds that the report, in conjunction with Stockham's answers to interrogatories and all work papers (which were made available to plaintiffs for inspection under protective order), provided ample opportunity for Dr. Barrett to assess the study in as much detail as he deemed warranted.

54. Dr. Barrett also criticized the selection of the performance criteria as "descriptions" of tests.

55. Dr. Ash disagreed, noting that in his judgment, the approach to the criteria was in the "upper 30% of the approaches to criterion development".

56. Dr. Barrett's criticism of the success criteria was not specific. He failed to support adequately his criticism, or to suggest an alternate approach which would have yielded more satisfactory success criteria. On the evidence in the record, the Court is convinced, and so finds, that Mr. Tabaka carefully analyzed job content and that the supervisors at Stockham assessed aptitudes which were necessary to meet the requirements of the job. Accordingly, the Court finds that the success criteria are entirely adequate for purposes of the validation study.

57. Dr. Barrett challenged the results of all the correlation computations which Mr. Tabaka performed in those cases where the subject pool was twenty or less. This amounted to 26 of the some sixty separate correlation computations. Of those 26, seventeen studies involved subject pools which ranged between twenty and sixteen.

58. The Court finds that the smaller the sample, the less stable the statistical result. However, the impact of a small sample is diminished somewhat by the fact that the "statistical significance" concept counterbalances sample size to a degree. That is, as the sample size becomes smaller, a much higher correlation coefficient must be obtained in order to achieve a satisfactory level of statistical significance.

59. The small subject pools of black employees had to be analyzed if Mr. Tabaka was to study black test performance independently in an effort to explore differential validity as apparently required by the Equal Employment Opportunity Commission's Guidelines. 29 C.F.R. § 1607.7(5).

60. Dr. Barrett did not completely reject Mr. Tabaka's use of the Pearson Product Moment Correlation Coefficient even where it was used with smaller samples.

61. Dr. Ash testified: "There is no algebraic, statistical or analytical reason for not computing a correlation coefficient on a sample that numbers four or more cases . . ."

62. Dr. Barrett believed the use of the Chi-square technique wholly inappropriate where there were fewer than twenty subjects in the pool. Dr. Ash concurred in principle, but observed that the Chi-square provided a useful approximation in samples as small as ten or twelve.

63. With respect to the statistical techniques, Dr. Ash testified:

> Well, I would say it's a little bit like somebody going out in the rain with a pair of rubbers and a raincoat and a hat and just to make sure, taking along an umbrella, and the umbrella may even have a couple of holes in it. Where the sample size was adequate, the computation of the Chi-square was proper, it didn't add information, it did not provide false information. Where the sample size was small, I will agree that it was uninterpretable in terms of the available Chi-square table. (T. Ash 2453-2454).

64. The Court recognizes the difficulty with the use of the Chi-square technique in those correlation calculations where there were fewer than twenty subjects. However, the Court finds that the Chi-square technique was not relied upon in making a recommendation to use or not use a test. All test recommendations are fully supported by a correlation coefficient arrived at by the Pearson Product Moment Coefficient. Accordingly, the Court finds that plaintiffs' criticism is of no practical consequence.

65. The Phi coefficient was used to ascertain the correlation in the samples of black employees. The Phi is a Pearson Product Moment Correlation under the situation in which the only values to be assumed by the variables are one and zero.

66. Dr. Barrett attempted to relate the Phi to Chi-square; Dr. Ash persuasively testified that the techniques were unrelated. He further testified that the reasons which make Chi-square unreliable for correlation studies of less than twenty subjects do not apply to Phi. The Court accepts Dr. Ash's testimony, and so finds.

67. At Dr. Ash's request, Mr. Tabaka prepared job expectancy tables utilizing the data in his validation studies. The job expectancy tables generally confirm the results obtained by the correlation studies.

68. In assessing the Tabaka study, Dr. Ash observed:

> It is my intuition that the Tabakas have brought together here a good collection of data analysis techniques and they have done a job which is in the upper thirty percent of all the studies that have been submitted to the Government and others that are pure unadulterated garbage. So it may not be flattering to be only at the seventy percentile, but I think it provides a personnel management with a reasonable set of decision rules, that to the extent to which it was technically feasible the degree of differential validity has been explored on a tentative basis, that the approach to the criteria has been judicious, mindful of race or bias and halo, and has used techniques which are emerging, particularly the job element aptitude approach. (T. Ash 2478-2479).

Dr. Barrett made no comparable assessment.

69. Dr. Ash testified that Mr. Tabaka's validation study met the technical requirements set out in the Equal Employment Opportunity Commission's Guidelines. Dr. Barrett did not testify that Mr. Tabaka's study failed to meet those guidelines.[2]

70. On the basis of the evidence presented, weighing testimony presented by Drs. Barrett and Ash, as well as that of Mr. Tabaka, the Court finds that plaintiffs' criticisms of the validation study are not substantiated. The study, on the contrary, was explicitly constructed with the Equal Employment Opportunity Commission's Guidelines in mind and the expert evidence presented by Stockham is persuasive. Dr. Barrett, while perhaps knowledgeable, was

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[2] Dr. Ash's opinion with respect to Guidelines' compliance did not encompass § 1607.11 ("disparate treatment"), which, as Dr. Ash testified, was a statement of "social policy", not scientific method.

plainly not as familiar with statistical techniques[3] as Dr. Ash and the Court finds his criticisms less persuasive than Dr. Ash's detailed testimony rejecting them. The Court finds, accordingly, that the Tabaka tests have been properly validated.

71. Where the Court has been required to decide between the conflicting expert opinions of Dr. Ash and Dr. Barrett, it has credited Dr. Ash because it has found Dr. Ash's opinion to be better supported by the evidence presented. Nonetheless, it is also apparent to the Court, based upon the testimony, demeanor, the experts' backgrounds and previous testimony history, that Dr. Barrett's objectivity has been compromised by his close and sympathetic identification with plaintiffs' position.

72. The fact that Stockham is continuing to analyze data does not support a conclusion that the present study is inadequate. Indeed, it would appear prudent to the Court to continue to monitor test operation. However, Dr. Ash characterized the Tabaka tests as a good interim set of decisional rules and the Court, on the basis of the evidence presented to it, so finds.

73. Both plaintiffs and Stockham agree, and the Court finds, that aptitude testing, properly used, is a useful tool to assure that selection decisions are free from bias.

M. [sic] Union Defendants

1. Local 3036 of the United Steelworkers of America has represented Stockham's production and maintenance employees at all times material to this action. Local 3036 is a subdivision of the international union, United Steelworkers of America.

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[3] Dr. Barrett was unable to define accurately the statistical concept of standard deviation; he attempted to define Phi as a function of Chi-square when it is a variant of the Pearson formula; and he was unfamiliar with some of the professional literature dealing with differential validity.

2. One of the functions of Local 3036 is the representation of Stockham's production and maintenance employees in furtherance of their contract demands.

3. Since World War II, the majority of Stockham's employees and the union's members has been black.

4. The majority of the members of the Local 3036 grievance committee and Local 3036's officers have been black employees of Stockham since at least 1967.

5. The departmental seniority policies of Stockham were predicated upon collective bargaining agreements negotiated between Stockham and Local 3036, composed of a majority of black employees and each such contract was ratified or approved by the members of Local 3036 at a meeting of the membership called for that purpose.

6. There is no evidence as to the union defendants, or either of them, of overtly maintaining racially discriminatory policies vis-a-vis the employees of Stockham.

III

Findings of Fact With Regard to the Specific Allegations of Discrimination of the Individual Plaintiffs

A. Individual Plaintiff Patrick James, Sr.

1. Patrick James graduated from Parker High School in 1939. He served in the United States Army until 1943 and received supply sergeant training. He completed a motion picture projection course and attended Booker T. Washington Business College in Birmingham, Alabama.

2. During the period from 1944 to 1946, inclusive, James attended Tuskegee Institute from time to time, but failed to complete a course of study. James completed the fall quarter in 1944, but failed to complete the winter quarter in 1944-45. He took one course in the summer of 1945 and attended Tuskegee in the fall of 1945, but failed to complete the fall quarter. He attended Tuskegee in the winter quarter of 1945-46, but failed to complete that quarter.

3. The certified transcript of James while he was a student at Tuskegee Institute reflects that James completed and received passing grades in three subjects, *i. e.*, light and power wiring, mechanical drawing, and electricity; the transcript further reveals that James took and received failing grades in seven other subjects, *i. e.*, Mathematics (twice), D. C. Circuits (twice), Mechanical Forum (twice), and English Composition. The certified transcript further reveals that Mr. James failed to successfully complete a single academic college-level course; that he was recommended for suspension for failure to attend classes, and that he was ultimately dropped from the rolls of Tuskegee Institute "because of poor scholarship" on December 20, 1945.

4. James held a number of jobs for short periods of time including jobs as a motion picture projectionist, insurance agent, porter at McGough Bakery, and porter and truck driver for Pizitz Department Store. He left each job after a short time in order to make more money. He came to Stockham in 1950 to make more money and he has remained at Stockham for approximately twenty-four years.

5. James initially worked as a laborer in the Malleable Foundry and after several interim jobs, he worked for approximately 20 years as a truck driver in the Receiving department.

6. James asked for and received a job as fork-lift operator in the Receiving department and the attendant pay increase.

7. Although James has generally received poor merit ratings, other black employees have received good merit ratings from the same supervisors who gave James poor

ratings in the Receiving department. (Stockham Ex. 84 and 85)

8. James was reprimanded on numerous occasions for spending too much time away from his job and he was repeatedly warned about leaving his job early for the lunch break.

9. James was disciplined on several occasions by Stockham, and once was laid off for disciplinary reasons. James filed a grievance under the bargaining agreement claiming his layoff was unfair but the arbitrator ruled Stockham had acted properly.

10. James applied for a job as a receiving clerk in 1966 and later for a job as a second class electrician. Since April, 1972, when James filed a timely application for a clerical job in the Receiving department, there have been two vacancies, one filled by a black employee and one filled by a white employee.

11. James was offered an incentive pay job (one which pays a bonus for good effort) in the Brass Core Room, but he refused it.

12. James never applied for a job for which he was qualified and for which he was passed over in favor of an equally or less-qualified white employee.

13. James has been Vice-President of Local 3036 since 1967.

14. James encouraged his son, Patrick, Jr., to apply for a job at Stockham in 1971 or 1972 because James believed Stockham was a good place to work.

B. Individual Plaintiff Howard Harville

1. Harville last worked at Stockham in May, 1970. He retired on medical disability in 1972, and currently receives a disability pension from Stockham.

2. Harville was employed by Belcher Lumber Company as a block setter (laborer) in a sawmill for 15 years. He came to Stockham in 1946 to make a better living.

3. Although he had no prior clerical experience, Harville applied for a job in the Shipping department. He worked for approximately 24 years as an arbor molder in the Grey Iron Foundry. It takes 3 to 6 months to learn to be an arbor molder and an arbor molder must spend approximately 2 to 3 hours a day in a kneeling position.

4. Harville never applied for a job for which he was qualified and for which he was passed over in favor of an equally or less-qualified white employee.

5. Harville had no formal education other than grammar school.

C. Individual Plaintiff Louis Winston

1. Louis Winston is a high school graduate. He was employed by Stockham in 1964. He did not request any specific job when he applied for employment with Stockham and was assigned to the Galvanizing department.

2. Before coming to Stockham, Winston worked as a stockman for New Williams and Birmingham Trunk, two local retail establishments. He sought employment at Stockham to make more money.

3. Winston was transferred to the Electrical Shop to avoid being laid off in the Galvanizing department. His work and attendance records in both departments were very satisfactory. When he had the opportunity to go back to the Galvanizing department, he elected to stay in the Electrical Shop.

4. While in the Electrical Shop, Winston did more than his job required and he learned some of the functions and duties of electricians. Upon entering the Apprentice Program, Winston was given 2,000 hours credit in the Pro-

gram in consideration for the knowledge he had gained while assisting and watching the electricians.

5. Louis Winston is presently in Stockham's Apprentice Training Program but he did not apply for the program until urged to do so by his foreman.

6. Winston assumed the office of Recording Secretary of Local 3036 in 1971.

7. Winston never applied for a job for which he was qualified and for which he was passed over in favor of an equally or less-qualified white employee.

IV

Findings of Facts With Regard to Relief Sought By Plaintiffs

A. Injunctive Relief

1. The evidence in this case is clear that injunctive relief with regard to Stockham's seniority system, promotions and transfers at Stockham, and initial job assignment at Stockham is inappropriate because plaintiffs have failed to carry their burden of proof on their claim that black employees have been locked into a racial stratification in pay, jobs or departments. Interdepartmental transfers have occurred and the large majority of such transfers were by black employees.

2. The record establishes that injunctive relief with regard to Stockham's training programs is not proper because plaintiffs have failed to establish by a preponderance of the evidence that the selection procedures for these programs discriminate against black employees.

3. Injunctive relief with regard to the selection of supervisors is not appropriate in this case because plaintiffs have failed to establish by a preponderance of the evidence that Stockham takes racial considerations into account in the selection process.

4. The record establishes that injunctive relief with regard to facilities at Stockham is inappropriate and unnecessary because Stockham has fully demonstrated its willingness to comply with the law. Furthermore, Stockham's efforts to resolve this issue recently led to a conciliation agreement with the EEOC which, as a practical matter, has made plaintiffs' requests for relief in connection with facilities moot.

5. The evidence in this case is clear that injunctive relief with regard to assignment of black employees to craft and highly skilled jobs is not appropriate because no black employee qualified for such a job has been passed over in favor of an equally or less-qualified white employee.

6. There is no showing that any qualified black employee has been passed over for a job as a clerk, salesman, guard or timekeeper in favor of an equally or less-qualified white employee; hence, injunctive relief in this regard is not appropriate.

7. The Tabaka tests have not been used to discriminate against black employees and the Court finds a decree sanctioning the continued use of the Tabaka tests is appropriate in this case.

B. Back Pay

1. Plaintiffs and the class or classes they represent are not entitled to an award of back pay because the proof is clear that the plaintiffs and the class or classes they represent have suffered no tangible economic loss as a result of racial discrimination.

2. Plaintiffs and the class or classes they represent are not entitled to an award of back pay because they failed to prove they had suffered a tangible economic loss as a result of racial discrimination.

C. Attorneys' Fees and Costs

1. Plaintiffs and the class or classes they represent are not entitled to an award of back pay because the record is clear that Stockham did not discriminate against plaintiffs, or the class or classes they represent, because of race.

2. Plaintiffs and the class or classes they represent are not entitled to an award of attorneys' fees or costs because plaintiffs have failed to prove that defendant Stockham discriminated against plaintiffs, or the class or classes they represent, because of race.

D. Conclusion

1. Plaintiffs failed to prove the allegations of their complaint and the Court finds that the allegations of the complaint are not supported by the evidence of record in this action.

Conclusions of Law

A. Jurisdiction

1. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over the parties thereto under Section 706(f)(3) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

2. This Court has jurisdiction with respect to claims against the defendant unions under the National Labor Relations Act, 29 U.S.C. § 151 et seq.

3. Stockham Valves and Fittings is an "employer" within the meaning of Section 701(b) of Title VII, 42 U.S.C. § 2000e(b), and Local 3036, United Steelworkers of America, AFL-CIO and United Steelworkers of America are "labor organizations" within the meaning of Section 701(d) and (e), 42 U.S.C. § 2000e(d), (e).

B. The Class

4. This action may be maintained as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure for purposes of resolving the allegations in plaintiffs' complaint.

5. The class represented by plaintiffs consists of all black hourly production and maintenance employees currently employed by Stockham and all black persons who have been so employed at Stockham from July 2, 1965 to the date of trial.

C. The Burden of Proof and the Use of Statistics

6. Plaintiffs, charging that their rights under Title VII and § 1981 have been violated, must prove the allegations of their complaint in order to prevail. Plaintiffs are required to prove by a preponderance of substantive evidence that Stockham and the defendant unions have intentionally engaged in unlawful employment practices in violation of Title VII. United States v. Jacksonville Terminal Co., 451 F.2d 418, 443 (5th Cir. 1971), cert. denied 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); Dawkins v. Nabisco, Inc., F. Supp., 7 EPD ¶ 9348 (N.D.Ga.1973).

7. When racial discrimination in employment practices and conditions is alleged, plaintiffs must first establish a prima facie case of discrimination before the burden of producing evidence shifts to the defendant. Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D.Ala. 1972), aff'd per curiam 476 F.2d 1287 (5th Cir. 1973); Boston Chapter, NAACP, Inc. v. Beecher, 371 F.Supp. 507 (D.Mass.1974).

8. The defendant may overcome the prima facie case by producing credible, contradictory evidence, but is not required to produce a preponderance of such evidence. The risk of nonpersuasion remains at all times on the plaintiffs.

Ochoa v. Monsanto Co., 335 F.Supp. 53 (S.D.Tex.1971), aff'd per curiam 473 F.2d 318 (5th Cir. 1973).

9. Although plaintiffs may establish a prima facie case through the use of statistical comparisons and exhibits (provided such statistics show that the alleged discriminatory practices have had a substantial adverse impact on blacks), the inferences raised from the statistics are not conclusive proof of discrimination. Ochoa v. Monsanto Co., *supra;* Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972). Statistical evidence, while obviously probative, does not relieve this Court of its obligation to determine whether plaintiffs have established the truth of their allegations.

10. The weight to be given any inferences raised by statistics varies according to the correctness, completeness, and comprehensiveness of the figures proffered. United States v. Jacksonville Terminal Co., *supra;* Hester v. Southern Ry., 497 F.2d 1374 (5th Cir. 1974). The complexities and variables of statistical evidence require close scrutiny of empirical proof. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 230 n. 44 (5th Cir. 1974).

11. The defendant in a civil rights case by introducing evidence which explains his employment practices on the basis of legitimate, nonracial grounds may refute any inferences of discrimination raised by a plaintiff. *E. g.,* Buckner v. Goodyear Tire & Rubber Co., *supra.*

12. Once a defendant has adequately rebutted any inferences raised, the burden shifts back to a plaintiff to come forward with further specific evidence of the discriminatory impact of the challenged practices. Plaintiffs have the burden of augmenting their statistics with other evidence showing that whites received job assignments denied blacks, that jobs were available when blacks applied, and that blacks were passed over in favor of whites with equal or inferior qualifications. United States v. Jacksonville Terminal Co., *supra;* Buckner v. Goodyear Tire & Rubber Co., *supra.*

Where plaintiffs fail to assume this additional burden, they also fail to carry their burden of proof on the case.

D. Initial Assignments, Promotions and Transfers Within Bargaining Unit (Stockham's Seniority System)

13. Plaintiffs' assertion that Stockham discriminates on the basis of race in pay for blacks and whites is based essentially upon the fact that mathematically the average earnings of blacks at Stockham are slightly lower than those of white employees. Plaintiffs, however, have failed to adjust for, or even consider at all, in their simplistic earnings statistics, the established preference and productivity factors which determine individual earnings, and accordingly plaintiffs' statistics are so incomplete and inconclusive as to raise no inferences of discrimination. See Roman v. ESB, Inc., 7 FEP 1063 (D.S.C.1971). Stockham has effectively demonstrated by evidence that plaintiffs' statistics in connection with earnings are "conflicting, equivocal, and probative of nothing." Ochoa v. Monsanto Co., *supra* at 59.

14. Based on the study made by Dr. James Gwartney of Stockham earnings and his testimony, this Court concludes that Stockham offers equal opportunities to blacks as far as earnings are concerned. This testimony is legally sufficient to prove that Stockham does not discriminate with respect to earnings between blacks and whites.[4]

15. Title VII of the Civil Rights Act of 1964 as amended, is not retroactive in effect and does not seek to punish an employer whose pre-July 2, 1965 employment practices, had they continued, may have violated its provisions. The Act,

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[4] Upon the basis of the evidence adduced in this case reflecting that blacks were among the highest wage earners in substantial numbers, this Court concludes that no stratification in earnings on the basis of race exists at Stockham. Compare Pettway v. American Cast Iron Pipe Co., *supra;* Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972) cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1973).

however, proscribes current employment practices to the extent they perpetuate the effects of past discrimination. United States v. St. Louis-S. F. Ry., 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1116, 93 S.Ct. 913, 34 L.Ed.2d 700 (1973). A showing of historical pre-Act racial discrimination alone does not establish a per se violation of the Act and plaintiffs are required to establish a casual nexus between past discrimination which may have existed in Stockham's plant and the challenged present conditions of employment. Peters v. Missouri-Pac. R. R., 438 F.2d 490 (5th Cir. 1973).

16. This Court must focus its inquiry on the impact, rather than the specific present intent on the part of defendants, of an allegedly discriminatory criterion or practice. Plaintiffs must establish that the defendants meant to engage in the challenged practice although no specific intent to discriminate need be shown. Local 189, United Papermakers and Paperworkers AFL-CIO v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

17. In analyzing an employer's promotion and transfer practices, the approach is in essence a search for artificial, arbitrary and unnecessary barriers to blacks who are qualified and seeking other jobs. Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). It must be shown that the promotion and transfer policies in fact do operate to "lock-in" qualified blacks seeking their rightful place.

18. Promotions and transfers at Stockham's facility are governed by the provisions of the collective bargaining agreement between the company and the defendant unions, and the seniority system established under this agreement is a unique form of departmental seniority. The maintenance by defendants of even a strict departmental seniority system in and of itself would not constitute a *per se* violation of Title VII. Heard v. Mueller Co., 4 FEP 1118

(E.D.Tenn. 1971), aff'd per curiam 464 F.2d 190 (6th Cir. 1972).

19. An absolute prerequisite to concluding that a departmental system violates the Act is a finding that employees were at one time assigned to seniority units on the basis of race. See Rodriguez v. East Texas Motor Freight, 505 F.2d 40, (5th Cir. 1975) (pattern of past discriminatory hiring is essential to plaintiffs' case); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va. 1968); Swint v. Pullman-Standard, 8 EPD ¶ 9720 (N.D.Ala.1974). See also Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974). Bare statistics showing only the racial composition of employees in departments does not—absent a study of the qualifications of applicants or at least a showing of examples in which qualified blacks were not assigned to certain departments—evidence discriminatory assignments. See Swint v. Pullman-Standard, *supra*. Since the seniority units at Stockham were established no later than 1950 and were developed because of functional, nonracial reasons, plaintiffs have failed to prove that employees at Stockham are now or ever have been assigned to departments on the basis of race.

20. In the leading cases decided under Title VII involving the problem of departmental seniority, there is an obvious, unarticulated assumption that blacks had definite incentives to transfer out of those departments which contained a high number of blacks. Typically a sharp contrast exists between the economic opportunities available in those departments which are predominantly black and those departments which are predominantly white; further there are typically demonstrably superior working conditions in those departments which are predominantly white. See e. g., Griggs v. Duke Power Co., *supra;* Waters v. Wisconsin Steel Works, 505 F.2d 1309 (7th Cir. 1974); Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437 (5th Cir. 1974); Pettway v. American Cast Iron Pipe Co.,

supra; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); United States v. Jacksonville Terminal Co., *supra;* Local 189, United Papermakers and Paperworkers, AFL-CIO v. United States, *supra;* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Quarles v. Philip Morris, Inc., *supra.* Plaintiffs have failed to prove that either of these two prerequisites exist at Stockham. Since there are equal earnings opportunities in almost all of the seniority units with no department or departments monopolizing the higher paying jobs, plaintiffs have failed to prove that Stockham maintains barriers to black employees desiring transfers between departments.

21. Although promotion decisions for bargaining unit jobs are made by supervisors, the procedures utilized by Stockham comply with the standards established by the Fifth Circuit in Rowe v. General Motors Corp., *supra.* See also Swint v. Pullman-Standard, *supra.*

22. A departmental seniority system violates Title VII only if it creates a barrier to qualified blacks seeking their rightful place. Plaintiffs have failed to establish that the unique seniority system at Stockham locks blacks into a "racial stratification in pay, jobs and departments." Pettway v. American Cast Iron Pipe Co., *supra.*[5] Plaintiffs

[5] Employees at Stockham are not deprived of notice of job openings and are not totally dependent upon their supervisors for promotion and transfer consideration. Compare Baxter v. Savannah Sugar Refining Corp., *supra;* Franks v. Bowman Transp. Co., *supra;* Rowe v. General Motors Corp., *supra;* Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972). Stockham has never maintained any policy against or restriction on transfers, nor any educational requirement for transferees. Compare Griggs v. Duke Power Co., *supra;* Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974); Franks v. Bowman Transp. Co., *supra;* Johnson v. Goodyear Tire & Rubber Co., *supra;* United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971); Quarles v. Philip Morris, Inc., *supra.* In addition there are no lines of progression and entry level jobs, so that an employee can transfer directly to any job vacancy within a seniority unit for which he is qualified. Compare Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971); Quarles v. Philip Morris, Inc., *supra.*

failed to establish that black employees remain in certain departments because of a fear of losing accumulated seniority. Compare Rodriguez v. East Texas Motor Freight, *supra* (plaintiffs had "strong disincentive" to transfer); Johnson v. Goodyear Tire & Rubber Co., *supra;* Quarles v. Philip Morris, Inc., *supra.* There are, and have been at all relevant times, realistic opportunities to transfer between Stockham's departments for all employees.

23. This Court, when confronted with plaintiffs' claims that blacks have been denied access to any given job or department, must consider the number of vacancies available subsequent to the effective date of the Act. Morrow v. Crisler, 479 F.2d 960 (5th Cir. 1973); rev'd on other grounds on rehearing en banc, 491 F.2d 1053 (5th Cir. 1974); Buckner v. Goodyear Tire & Rubber Co., *supra.* Plainly, racial discrimination in assignment to jobs or departments can occur only when the employer makes a selection decision incident to filling a vacancy. To the extent there have been no vacancies, there can be no such racial discrimination in violation of the Act.

24. Congress did not intend in enacting Title VII to guarantee a job to every person regardless of qualifications.

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications a controlling factor, so that race, religion, nationality and sex become irrelevant."

Griggs v. Duke Power Co., *supra,* 401 U.S. at 436, 91 S.Ct. at 856. The intent of Congress was to make the qualifica-

tions of competing individuals for any given job the controlling factor in promotion and transfer decisions, and an employer has the right to insist that an employee be qualified or competent to handle a particular job. See, *e.g.*, United States v. Jacksonville Terminal Co., *supra* at 445; Terrell v. Feldstein Co., 5 EPD ¶ 8039 (N.D.Ala.), aff'd 468 F.2d 910 (5th Cir. 1972); Wilson v. Woodward Iron Co., 362 F.Supp. 886 (N.D.Ala.1973). Necessarily, the relative competency and qualifications of competing employees are relevant factors in attempting to determine whether unlawful discrimination exists. Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968).

25. Because of the overriding considerations of basic job competency, where a company can establish the qualifications and skills required to perform successfully a particular job and the plaintiffs have failed to show an instance of a qualified black being denied the job, there has been no showing of racial discrimination in evaluating the abilities and capacities of hourly employees. Buckner v. Goodyear Tire & Rubber Co., *supra*. Stockham showed the qualifications, in the form of objective criteria applied to all workers alike, needed by individuals in order to perform safely and efficiently the craft and high skill jobs. Plaintiffs were unable to show a single instance of a qualified black who sought one of these jobs and was rejected while whites of equal or inferior qualifications obtained the job.

26. When considering the number of blacks in jobs which require special skills and abilities, the relevant figure for comparison purposes is the percentage of blacks in the local labor market who are qualified for such jobs. The relevant labor pool cannot be assumed to be the same as the general population where the jobs demand skills and training possessed by relatively few individuals. Hester v. Southern Ry., *supra;* McAdory v. Scientific Research Instruments, Inc., 355 F.Supp. 468 (D.Ind.1973); Castro v. Beecher, 334 F.Supp. 930 (D.Mass.1971); Dobbins v. Local 212 IBEW AFL-CIO, 292 F.Supp. 413 (S.D.Ohio 1968).

27. The relatively small number of blacks in certain high skilled and craft jobs at Stockham is due not to any discriminatory practices of Stockham, but due instead to the absence of qualified blacks. An employer is entitled to insist that his workers be qualified and as long as the qualifications, as in this case, are not artificial or established with an intent to discriminate, the employer is not required to place individuals of any race who lack such qualifications on the job. Plaintiffs have failed to establish racial stratification, through either initial job assignments or promotion and transfer decisions, in the job classification system at Stockham.

E. Supervisors

28. In order to rebut any inferences raised by statistics showing a relatively small number of blacks in supervisory positions, the defendant may show that selection is done on the basis of objective, job-related criteria. Watkins v. Scott Paper Co., 6 FEP 511 (S.D.Ala.1973); Turner v. Firestone Tire & Rubber Co., F.Supp., 4 FEP 639 (W.D.Tenn. 1971). The lack of totally objective criteria is not *per se* a statutory violation or necessarily even evidence of any such violation. Swint v. Pullman-Standard, *supra*.

29. Selection of supervisors at Stockham is accomplished by the highest level management officials applying the most objective criteria possible. Since plaintiffs produced no testimony or other evidence to suggest that such criteria is not fairly applied, or that a qualified black was denied promotion to a supervisory position or that there were any instances when qualified black employees were "passed over" in favor of equally or less qualified whites, no violation of the Act has been proved. Compare Gilmore v. Kansas City Ry., 7 EPD ¶ 9338 (W.D.Mo.1974), with

Pettway v. American Cast Iron Pipe Co., *supra* and United States v. N.L.Indus., Inc., 479 F.2d 354 (8th Cir. 1973).

30. Furthermore, since there is a low turnover rate among supervisory personnel, and thus relatively few vacancies, the comparatively small number of blacks holding supervisor jobs, properly evaluated, does not establish discrimination in the selection of supervisors as a matter of law, especially in the absence of a showing of a single qualified black denied employment or promotion to a supervisory position. Swint v. Pullman-Standard, *supra;* Quarles v. Philip Morris, Inc., *supra.*

F. Clerical, Timekeeper, Sales and Guard Jobs

31. The statistics introduced by plaintiffs in connection with clerical, timekeeper, sales and guard jobs failed to show a substantial adverse impact on black employees at Stockham, and are not sufficient to shift the burden of coming forward with evidence about the nature of such jobs to Stockham. Compare Franks v. Bowman Transp. Co., *supra;* United States v. N. L. Industries, Inc., *supra.*

32. Stockham has not excluded or limited, in any manner, blacks from entering these jobs, in light of the fact that Stockham has introduced evidence showing the special aptitudes and capabilities required of clerical employees and the qualifications required of persons hired in a salesman capacity; evidence showing that few vacancies existed in clerical positions; and evidence showing that although more whites filed timely applications, the successful application percentages for black and white applicants are substantially equal. Plaintiffs were unable to show a single qualified black who was denied any of these jobs. Compare United States v. N. L. Indus., Inc., *supra.*

G. Apprentice Training Program

33. There has been no showing on the part of plaintiffs that the education and age guidelines produce a disproportionate impact on black applicants,[6] see Pettway v. American Cast Iron Pipe Co., *supra;* Barnett v. W. T. Grant Co., FEP 434 (W.D.N.C. 1974), as there is no significant difference between the percentage of black and white employees at Stockham possessing high school educations. Until a showing of disproportionate impact is made, Stockham is not required to demonstrate that the education and age requirements are job related. *Id.*

34. This Court must evaluate the number of blacks entering the program after July 2, 1965 in light of the relative number of applications by blacks and whites. Buckner v. Goodyear Tire & Rubber Co., *supra* (number of blacks accepted was comparable to the application rate by blacks). Since plaintiffs failed to show any qualified black who was denied admission, the apprentice program, in both design and operation, does not discriminate against black employees.

H. Other Training Programs

35. There has been no showing that either the Management Training Program or the Personnel Development Program discriminates against blacks in violation of Title VII.

I. Stockham's Employment Testing Practices

36. Title VII of the Civil Rights Act of 1964, as amended, does not prohibit aptitude testing in employment; on the contrary, the Act expressly recognizes that job-related aptitude tests, properly selected and administered, assist an employer in making objective, non-discriminatory selection decisions. "[N]or shall it be an unlawful employment practice for an employer to give and to act

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[6] The evidence clearly shows that the age and educational guidelines can be, and have been, waived for both blacks and whites, and that Stockham has allowed employees of both races to enter the program with advance standing when so qualified.

upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. A. § 2000e-2(h).

37. A nonvalidated employment aptitude test does not violate Title VII *per se*. An employment aptitude test is subject to challenge under Title VII once plaintiff makes a showing that the test subject to attack disproportionately disqualifies black employees or applicants. Griggs v. Duke Power Co., *supra;* Hester v. Southern Ry., 497 F.2d 1374, 1381 (5th Cir. 1974); Davis v. Washington, 512 F.2d 956 (D.C.Cir. 1975); Equal Employment Opportunity Commission, "Guidelines on Employment Selection Procedures," 29 C.F.R. § 1607.3

38. A statistical showing of racially disproportionate impact of an employment test establishes the requisite "racial connection". Woods v. North American Rockwell Corp., 480 F.2d 644 (10th Cir. 1973).

39. The evidence of racially disproportionate impact of a particular employment test must be clear and convincing. Hester v. Southern Ry., *supra;* Watkins v. Scott Paper Co., 6 EPD ¶ 8912 at pp. 5872-73 (S.D.Ala. 1973). The Court must be certain that the administration of the challenged test, and not other factors, disproportionately disadvantages black applicants or employees.

40. Proof of racially disproportionate impact may consist of either direct evidence that blacks have scored poorer than whites on the challenged test (*i. e.*, comparison of black and white pass-fail rates or mean scores) or circumstantial evidence that blacks have been disqualified in greater proportions than whites as a result of the challenged tests. Compare United States v. Georgia Power Co., *supra* at 912 n. 5, with Boston Chapter NAACP v. Beecher, 371 F.Supp. 507 (D.Mass.) aff'd 504 F.2d 1017 (1st Cir. 1974). See also Hester v. Southern Ry., *supra;* Douglas v. Hampton, 512 F.2d 976 (D.C.Cir. 1975).

41. Plaintiffs have not offered any competent evidence, direct or indirect that the Wonderlic test, as administered at Stockham in the period from 1965 through 1971, disqualified a disproportionate number of black applicants or employees. In the absence of evidence of a racially disproportionate impact, the defendant-employer was under no obligation to go forward and prove that the Wonderlic test, as administered during that period, was job-related. Griggs v. Duke Power Co., *supra;* Boston Chapter, NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974).

42. With respect to the Tabaka test battery, which Stockham began utilizing in 1973, there is no evidence of any kind that those tests have disqualified any blacks from any position at Stockham, and thus no showing of adverse impact has been made.

43. In the absence of a showing of a racially disproportionate impact of the Tabaka the defendant-employer was not obligated to go forward with proof that the tests were job-related or validated. Although on the record in this case, the court is clearly not required to reach conclusions of law with respect to the study, it will do so in the interest of both a complete record and judicial economy. See, Watkins v. Scott Paper Co., *supra*.

44. The Equal Employment Opportunity Commission "Guidelines on Employment Selection Procedures," which deal with the technical requirements of test validation, are entitled to deference by this court although the Guidelines do not have the force of law. Griggs v. Duke Power Co., *supra;* United States v. Georgia Power Co., *supra;* United States v. Jacksonville Terminal Co., *supra* at 456.

45. The technical requirements of the Equal Employment Opportunity Commission Guidelines have been met by the validation study relating to the "Tabaka" Test;

and the study was a profesionally competent study conducted by a recognized expert.

46. The Court concludes as a matter of law that the specific methodology used in the study was professionally sound and reasonable; its reliability is unquestionable. In particular, the court's conclusions with respect to the study are (a) the law does not require that the results of a validation study be reported by the expert to his client in any particular form, (b) where technically feasible, the study accommodates the hypotheses of differential validity and studies black employees separately from whites, (c) the job analysis employed appears to meet the Commission's Guidelines as to the success criteria selected, (d) the statistical techniques utilized in reaching the conclusions reflected by the validation study are professionally sound and, (e) the performance ratings obtained appear to be free from rater bias in all respects.

47. Stockham demonstrated the validity of the Tabaka tests, *i. e.*, "job-relatedness," to the extent that available data and sound professional judgment permitted. Further, the consultant's recommendation that Stockham continue to gather additional validation data does not deprive the present study of its usefulness; as a matter of law, Stockham is entitled to rely upon the present study as additional data is collected.

48. Title VII does not require that an employer freeze its selection techniques; an employer is free to adopt new and different selection techniques so long as those techniques do not themselves operate in a discriminatory fashion.

49. The Court rejects the mechanical application of the Equal Employment Opportunity Commission's Disparate Treatment Guideline, 29 C.F.R. § 1697.11, since that guideline is inconsistent with the plain language of the statute permitting utilization of job-related aptitude tests. 42 U.S. C.A. § 2000e-2(h). Further, the guideline does not accommodate changing technology, such as the record reflects in this case, or the adoption of lawfully validated tests which take into account the hypothesis of differential validity.

J. The Union Defendants

50. Since this Court finds that there has been no violation of the Act, there is of course no liability on the part of the defendant unions. However, in the interest of judicial economy, this Court concludes that if liability existed, and since the contract between Stockham and the unions is the product of negotiation, the defendant unions would also be liable in their roles as bargaining agent in the collective bargaining process. See Rodriguez v. East Texas Motor Freight, *supra;* Johnson v. Goodyear Tire & Rubber Co., *supra;* United States v. United States Steel Corp., 371 F.Supp. 1045 (N.D.Ala.1973).

K. Facilities

51. Injunctive relief as to facilities at Stockham is improper and unnecessary in this case. This Court recognizes the important role played by conciliation in Title VII enforcement. Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); EEOC v. U. S. Pipe and Foundry Co., 375 F.Supp. 237 (N.D.Ala.1974). Although no agreement was reached in the context of this case, Stockham and the EEOC were able to conciliate the facilities issue in the framework of another charge, and the facilities issue has been effectively resolved.

L. Back Pay

52. Section 706(g) of the Civil Rights Act of 1964 provides as follows:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint,

the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer . . . or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the Court deems appropriate. . . ."

53. The award of back pay is an equitable remedy which may be granted by the district court in its discretion and is not a damage remedy. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971). The decision to grant or deny back pay rests in the discretion of the federal district court which is empowered to fashion remedies in Title VII actions as "the equities of the particular case compel." *LeBlanc* v. *Southern Bell Tel. and Tel. Co.*, 460 F.2d 1228, 1229 (5th Cir. 1972), *cert. denied* 409 U.S. 990 (1973).

54. An award of back pay is not designed to punish a defendant who may have violated the Act, but rather is intended to restore those individuals wronged to their rightful economic status. *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). Since the primary role of back pay is to provide compensation for tangible economic loss, the law requires that plaintiffs first establish that they have "sustained economic loss from a discriminatory employment practice." *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, at 3321. See also *Johnson* v. *Goodyear Tire & Rubber Co.*, *supra* (employees who have been victims of discrimination had directly caused "economic loss" and "financial deprivation" to black employees). As noted by the Fifth Circuit:

". . . Whether black workers were economically injured by unlawful discrimination and require a back pay award to make them whole is the issue."

Pettway v. *American Cast Iron Pipe Co.*, *supra*. The record in this case is barren of any persuasive evidence of tangible economic loss with respect to the class. Furthermore, plaintiffs have not proved the existence of any discriminatory condition or practice at Stockham which would effect earnings and therefore be relevant to the award *vel non* of back pay. Consequently, no back pay is awarded to plaintiffs and the class they represent.

M. INJUNCTIVE RELIEF

55. This Court concludes that plaintiffs are not entitled to injunctive or declaratory relief of any kind as they have failed to prove the allegations of their complaint.

N. ATTORNEYS' FEES

56. Having failed to prove a violation of Title VII and Section 1981 on all issues, with the possible exception of the "facilities" issue the plaintiffs are not entitled to recover attorneys' fees (apart from the facilities issue) and their request therefor is accordingly denied.

This the 19th day of March, 1975.

/s/ J. FOY GUIN, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

(Caption Omitted in Printing)

Judgment

(filed March 19, 1975)

Findings of Fact and Conclusions of Law having this day been made and entered in this action and filed concurrently herewith, it is hereby ORDERED, ADJUDGED, and DECREED by the Court, as follows:

(1) Judgment is hereby rendered in favor of each of the defendants, Stockham Valves & Fittings, Inc. (Stockham), United Steelworkers of America, and Local Union 3036, United Steelworkers of America, on all issues raised by plaintiffs, individually, and on behalf of the class heretofore defined by the Court; subject to the following:

(a) With regard to the issue of racially discriminatory facilities defendant Stockham is ordered to file with the Court within 15 days after the date of this judgment a written report specifically advising the Court the extent to which Stockham has carried out the obligations imposed upon Stockham by the conciliation agreement entered into between Stockham and the Equal Employment Opportunity Commission heretofore made a part of the record herein at Stockham Exhibit 34.

(b) Although Stockham has not heretofore imposed its existing age and educational requirements as absolute barriers to applicants for the Stockham apprenticeship program, such existing requirements may not appropriately be imposed by Stockham in the future as an unconditional requirement for entry to members of the class who apply for such program and who possess

qualifications at least equivalent to those for whom such age and educational requirements have heretofore been waived by Stockham and it is so ordered.

(2) Although the record reflects good faith efforts by Stockham to bring the Equal Employment Opportunity Commission to the conciliation table both before and after the lawsuit was filed, the filing of this lawsuit may have played a therapeutic role in bringing about the conciliation agreement between Stockham and the Equal Employment Opportunity Commission with regard to the subject of racially discriminatory facilities. Under the circumstances the Court is inclined to the view that plaintiffs are entitled to a reasonable attorneys' fee, because this action may have contributed to the resolution of the facilities issue; (the amount of such fee is, of course, subject to the limitation that, in all respects otherwise, plaintiffs are not "prevailing parties" in this litigation). It is so ordered.

(3) For purposes stated in paragraphs (1)(a) and (2) above, and for interpretative purposes, jurisdiction is hereby retained. In all other respects this action is hereby dismissed with prejudice.

(4) Each party shall bear its own costs and expenses, except as hereinabove ordered.

This the 19th day of March, 1975.

/s/ J. FOY GUIN, JR.
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

October 13, 1977

EDWARD W. WADSWORTH
Clerk

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New Orleans, La. 70130

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No. 75-2176
Patrick James, ET AL. v.
Stockham Valves and Fittings Co., ET AL.

Mandate Stayed To and Including November 12, 1977

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated

as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*
By /s/ SUSAN N. GRAVVIS
Susan N. Gravvis
Deputy Clerk

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-670

STOCKHAM VALVES AND FITTINGS, INC.,

Petitioner,

v.

PATRICK JAMES, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The petition for certiorari inadequately describes the employment practices at the Birmingham plant of Stockham Valves and Fittings, Inc. by ignoring a consistent, overriding factor of employment at Stockham: segregation. Jobs, promotions, training opportunities, and facilities were

all assigned by race. Overt segregation continued until the trial of this case in 1974.[1/]

At least until 1965, Stockham segregated all jobs by race (A 20-21, 26-27); while there was some token integration after 1965, the historical practice of assigning employees by race and excluding black workers from the higher job classifications continued (A 23-25, 28-29, 33). Since practically all skilled hourly and supervisory positions were filled from the plant workforce, the Company maintained extensive training programs in order to prepare hourly personnel for these positions. Blacks were totally excluded from the supervisory training program until 1970[2/] and from the apprentice training programs until 1971 (A 59-62). The Company maintained a segregated work environment of separate bathrooms,

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1/ James, Winston, and Harville filed their charges with the EEOC in 1966 alleging segregated facilities and other discriminatory employment practices (A 3). Thus, the monetary liability of the Company extends to 1965. Albemarle Paper Company v. Moody, 422 U.S. 405, 410 n.3 (1975); cf. United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

2/ There was not one black foreman until May 1971, despite the fact that the Company selected the large majority of its over 100 supervisors from the hourly workforce which was over 60% black (A 69-72).

bath house, and cafeteria at least until trial in 1974.[3/]

Moreover, since the passage of Title VII the Company has substituted facially "neutral" discriminatory practices for some of its previously overt discriminatory practices.[4/] For example, in August 1965, contemporaneously with the effective date of Title VII, the Company instituted an extensive testing program which effectively precluded black workers from advancing to higher job classifications (A 45-54).[5/] The Company for

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3/ See generally A 15-19. Until 1969 the Company even assigned employees' identification badges by race: blacks received badges with numbers below 3,000 and whites with numbers above 3,000 (A 16). The record shows that, at the time of trial, racially segregated restrooms were still maintained in the dispensary (A 18 n.9).

4/ See the discussions comparing "neutral" and "intentional" practices in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977), and Dothard v. Rawlinson, 53 L.Ed.2d 786, 797 (1977).

5/ There was no testing of job incumbents but only of applicants or current employees who sought promotional or training opportunities. See Albemarle Paper Company v. Moody, 422 U.S. 405, 434 (1975). The same test, the Wonderlic Personnel Test, was used by Stockham as was used by Albemarle Paper Company.

many of its other employment decisions relied on the subjective and unguided discretion of its virtually all-white supervisory staff which, as might be expected in a company where even the facilities were segregated, resulted in severely limited promotional and training oportunities for black workers (A 32-33, 68-70).[6/]

REASONS FOR DENYING THE WRIT

1. The Fifth Circuit's Decision Is Consistent With Supreme Court Decisions, And There Is No Conflict Among the Circuits.

The analysis of the statistical evidence is not, as argued by Stockham, contrary to recent decisions of the Court. The statistical evidence presented by the plaintiffs showed an enormous disparity between the employment of blacks and

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6/ The most transparent of the Company's "neutral" practices was the age requirement instituted in 1970. In order to enter the apprentice program an employee had to be no older than 30 (excluding time in the military service). Since the Company had excluded all blacks from the program until 1971, any black worker who had reached the age of 30 prior to 1971 was permanently barred from any opportunity to apply or qualify for apprentice training (A 65).

whites by job and job class,[7/] by department,[8/] by training program,[9/] and by supervisory position.[10/]

7/ As of September 1973, of the 366 white non-incentive workers, 274 or 75% were in job classes 9-13 (the five highest paid classes) compared to only 11 or 3% of the 371 black non-incentive workers; 135 or 76% of the 178 white incentive workers were in the two highest-paid incentive job classes, 8-9, compared to 20 or 2% of the 872 black incentive workers (A 28-29).

8/ As of September 1973, 903 or 72% of all blacks in the hourly workforce worked in the foundry-related departments or shipping and dispatching departments, compared to only 75 or 13% of all whites in the hourly workforce; 208 or 36% of all whites in the hourly workforce were employed in the maintenance departments compared to 28 or 2% of all blacks.

Most importantly, of the 162 employees hired since 1965 to work in the historically white departments, 147 or 90% were white; whereas, of the 695 hired since 1965 to work in predominantly black departments, 624 or 89.8% were black (A 25).

9/ In June 1973, there were 227 whites and 6 blacks employed as craftsmen (A 59). Of the 101 employees selected into the apprentice training program since 1965 only 6 were black even though the overwhelming majority were selected from an hourly workforce which was over 60% black(A 60).

10/ In 1973, of the 120 foremen only 5 were black; there was not one black among the 26 superintendents and 6 general foremen. This (contd.)

"Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern of discrimination." Hazelwood School District v. United States, 53 L.Ed.2d 768, 777 (1977).

Stockham contends that despite these disparities the plaintiffs did not prove a prima facie case under recent decisions of the Court because they failed to prove either that there was a disparity between the percentage of blacks in skilled jobs in the relevant labor market and the percentage of blacks in the skilled jobs at the plant, or that blacks in the plant had the qualifications for training for or promotion to higher-paid, skilled jobs. Stockham errs both on the facts and on the law. The asserted issue concerning statistics simply is not presented by the facts of this case. Initially, Stockham ignores the fact that the plaintiffs' prima facie case was not based solely on statistics but was buttressed by substantial evidence of intentional

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10/ contd.
disparity cannot be attributed to discrimination prior to 1965 since over 60% of the supervisory workforce had been selected after the effective date of Title VII (A 69-71).

discrimination,[11] by the Company's use of facially neutral practices which had an adverse impact and were not job related,[12] Griggs v. Duke Power Company, 401 U.S. 424 (1971), and by examples of discrimination against individual black employees.[13] Moreover, as the record makes clear, the appropriate standard for statistical comparison is between the percentage of blacks in the Company's historically black jobs --the lower paying, foundry jobs--and the percentage of blacks in the Company's historically white jobs--the higher paying, skilled jobs:[14] (1) the Company

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11/ See, e.g.,A 33 (job assignment); A 15-19 (segregated facilities); A 71-72 (recruitment).

12/ See, e.g.,A 45-54 (Wonderlic Personnel Test); A 63-65 (high school education); A 65-69 (age requirement).

13/ See, e.g.,A 62 n.50 (Louis Winston); A 61-62 n.50 (Francis Smith); A 16-18 n.7-8 (Claude Chapman).

14/ The record demonstrates that there was substantial turnover in personnel and that the gross racial disparity in jobs at the plant was due to post-1965 practices. See, e.g., nn.8-10, supra. Cf. Hazelwood School District v. United States, 53 L.Ed.2d 768, 778-79 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 341-42 (1977).

trained the overwhelming majority of its skilled workers by on-the-job training programs or apprentice programs; (2) there were few skilled workers, either black or white, available in the labor market (A 60 n.49)[15/]; (3) there was no evidence that a difference in job-relevant qualifications between white and black workers explained the gross disparity in racial job assignments (A 37-45); (4) the Company, as admitted by the plant manager, vice president and other Company officials (A 20-21), did not consider blacks, whatever their qualifications, for training programs and other "white" jobs prior to 1965, and there is no evidence to rebut the presumption that the Company's continued post-1965 staffing of jobs consistent with the historical pattern has been due to anything other than intentional racial discrimination.[16/] See, Village of Arlington

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15/ The Company recruited at predominantly white schools in the area but totally refused to recruit at the predominantly black schools (A 71-72).

16/ The Company introduced evidence that there were jobs at the plant which required skill; but it introduced no evidence that the white workers who were selected to train for these jobs had necessary skills or qualifications which the black workers did not have.

Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-67 (1977); Hazelwood School District v. United States, supra, 53 L.Ed.2d at 778-79 n.15.

A racial disparity in the selection of "actual applicants" has been recognized as a highly relevant statistical measure. Hazelwood School District v. United States, supra, 53 L.Ed. 2d at 778 n.13. Here the plant workforce is analogous to "actual applicants" since the Company, in the overwhelming majority of cases, selected for skilled, training, and supervisory jobs from among its present employees. In certain circumstances, as where actual pool or applicant data are inadequate or unavailable, unlike the present case, labor force or population statistics may be used.[17/] Dothard v. Rawlinson, 53 L.Ed.2d

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17/ Even assuming, arguendo, that at the time of trial there was parity between the percentage of blacks in skilled jobs at the Company and the percentage of blacks in the skilled work force, and that this was the proper standard for comparison, the statistical analysis would still show a significant disparity from 1965 to 1971. During this period there were zero blacks in skilled jobs at the Company: "Nothing is as emphatic as zero." United States v. Hinds County School Board, 417 F.2d 852, 858 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970).

786, 798 (1977). Contrary to Stockham's assertions, the Fifth Circuit's reliance on the racial disparities within Stockham's work force not only is consistent with but is compelled by the recent decisions of this Court.

The Fifth Circuit's use of statistical comparisons does not conflict with decisions of the Fourth Circuit,[18/] as the Company contends. In Patterson v. American Tobacco Co., where the pertinent employment practice involved the hiring of supervisors and where the employer, unlike Stockham, hired its supervisors from outside the plant, the sole issue was whether the standard for comparison should be the proportion of blacks in the entire labor force or the proportion in the labor force category which includes supervisory personnel. 535 F.2d at 274-75.[19/] In Roman v. ESB, Inc.,

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18/ See, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976); Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976)(en banc).

19/ Even though the employer in Patterson hired a percentage of black supervisors higher than that in the labor force, the Fourth Circuit held that, while no affirmative injunction was required, the Company had violated Title VII with respect to the selection of supervisors from its own work force. Patterson v. American Tobacco Co., supra at 275.

the plaintiffs failed to demonstrate whether craftsmen or supervisors were selected by initial hire or by promotion.[20/] Accordingly, a comparison with the labor force was relevant. Significantly, the Fourth Circuit also reviewed the assignment of blacks within the plant's work force and determined that, unlike this case, there was no substantial statistical imbalance and no history of segregation. 550 F.2d at 1353-54.

2. The Fifth Circuit's Decision Is Correct.

Stockham's assertion that the Fifth Circuit incorrectly exercised its function of appellate review in reversing factual and legal conclusions of the district court requires little comment since the Fifth Circuit's exhaustively documented unanimous opinion is, itself, the best response. However, it is significant that Stockham ignores the principal factual reversal made by the Fifth Circuit. The district court found that "at no time" did Stockham assign employees by race (A 129, A 209), despite the unrebutted statistical showing that not one hourly job at

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20/ The Fourth Circuit went so far as to state that "[t]he representation in this action was inadequate as to the class." 550 F.2d at 1356.

Stockham was integrated in 1965 (A 21) and the direct admissions by the plant manager, vice president, and several supervisors that there was job segregation at the Company (A 20-21). Moreover, the district court after three days of testimony directed plaintiffs' counsel not to inquire further into job segregation because the testimony was "cumulative" and "[i]t [job segregation] doesn't need to be hammered into my head" (A 21 n.10).[21/] This finding of the lower court, and other findings reversed by the Fifth Circuit, are practically inexplicable except for the district court's unfortunate practice of adopting, virtually verbatim, over 100 pages of the Company's proposed findings of fact and conclusions of law (A 4-5 n.1).[22/] Cf. United States v. El Paso Natural Gas Co., 376 U.S. 651, 657 (1964).

21/ The district court also stated in response to argument by counsel for Stockham, "I believe Mr. Sims [Plant Manager] testified already and he was an adverse witness and I believe the situation about jobs by race is already clear. This is accumulative (sic)"(Fifth Circuit Appendix at 717).

22/ The Fifth Circuit noted that "92 percent of the district court's factual findings are identically or substantially the same as those the (contd.)

The far-fetched nature of Stockham's argument is best exemplified by its assertion that the Fifth Circuit "far departed" from proper appellate review when it reversed the legal conclusion of the district court that Stockham was in "good faith" in integrating its segregated facilities in 1974 and that Stockham's efforts to integrate its facilities were frustrated by the EEOC's failure to perform its role of conciliation (Pet. 18). Stockham does not explain how the maintenance of segregated bathrooms, cafeterias, and bath houses until 1974 demonstrated "good faith," nor does Stockham explain how the EEOC's failure to conciliate (if in fact it did) could have frustrated for so many years the Company's efforts to tear down some walls in its plant.[23/]

22/ contd.
defendant Stockham suggested; while, 98.2 percent of the district court's conclusions of law are identically or substantially the same as conclusions proposed by Stockham" (A 4).

23/ Counsel for plaintiffs are unaware of any other Title VII case where a defendant maintained segregated facilities until 1974. For example, at the large plant of United States Steel Corporation in Birmingham the facilities were fully (contd.)

Stockham's last argument for the issuance of a writ of certiorari -- that the Fifth Circuit erred in refusing to hold that an analysis of the educational attainments of black and white workers rebutted plaintiffs' prima facie case -- is trivial (Pet. 25-29). The evidence of educational attainment is not responsive to plaintiffs' proof of intentional discrimination[24/] and unlawful facially neutral practices. Education was simply one of eight "factors" which, when taken together, defendant's expert testified, "explained" the earnings disparity between blacks and whites. However, as the Fifth Circuit's persuasive review showed, these factors incorporate the discriminatory practices of the Company in their definition

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23/ (contd.)
integrated in the early 1960s. United States v. United States Steel Corporation, 371 F.Supp. 1045, 1055 (N.D.Ala. 1973), rev'd in part, 520 F.2d 1043 (5th Cir.1975), cert. denied, 419 U.S. 817 (1976).

24/ In fact, the evidence as to educational attainment serves to emphasize the intentional job segregation at Stockham. According to Stockham's own evidence there were, in 1972, 100 blacks (as compared to 90 whites) who had 13-15 years of education and 674 blacks (as compared to 358 whites) who had a high school education; yet there was not one black apprentice at the Company until April 1971, and not one black foreman until May 1971 (Defendant's Exhibit 4, Fifth Circuit Appendix at 3872).

and thus, if anything, confirm the plaintiffs' prima facie case (A 40-42).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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